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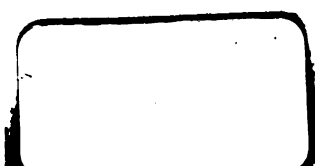
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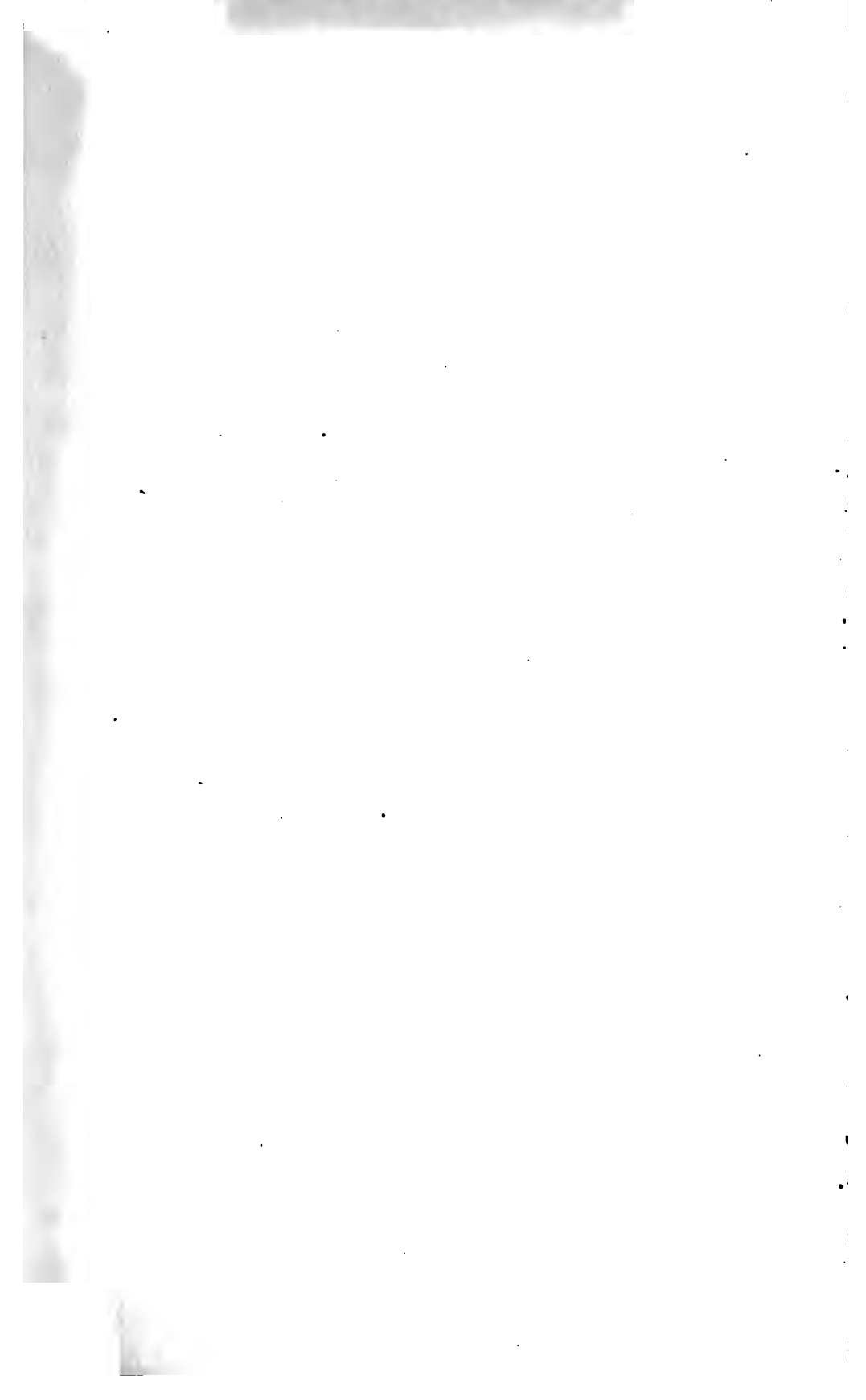


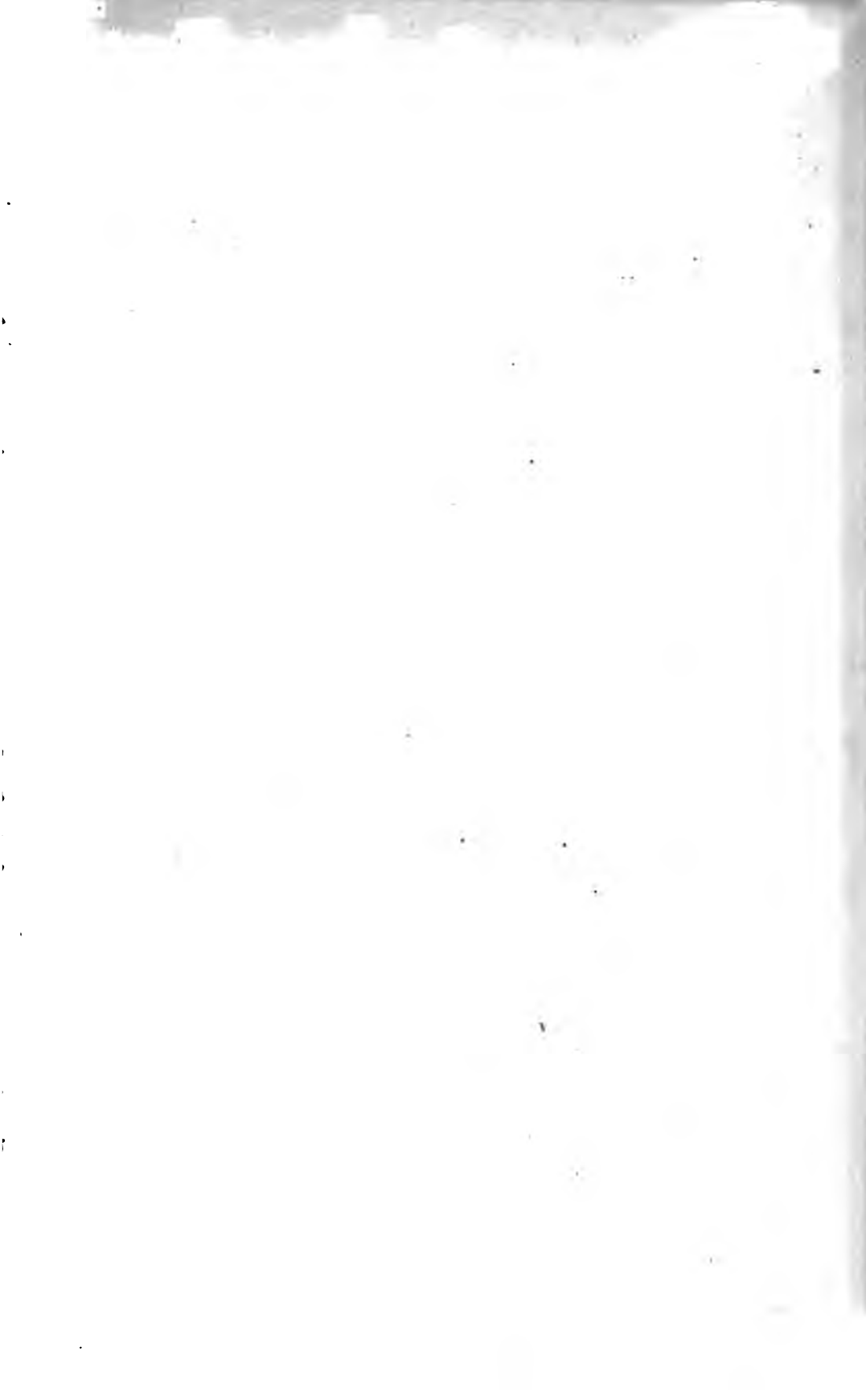
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THE  
HOUSE OF LORDS CASES

ON

APPEALS AND WRITS OF ERROR,  
AND CLAIMS OF PEERAGE,

DURING THE SESSIONS

1862, 1863, AND 1864.

By CHARLES CLARK, Esq.,  
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

BY APPOINTMENT OF THE HOUSE OF LORDS.

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## MEMORANDA.

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IN the Vacation after Trinity Term, 29 July, 1863, The Right Hon. Sir Cresswell Cresswell, Judge of the Court of Probate and Judge Ordinary, died.

Sir James Plaisted Wilde, one of the Barons of the Exchequer, was appointed his successor in these offices, and was sworn of her Majesty's most Honourable Privy Council.

Sir William Atherton, her Majesty's Attorney-General, in the latter part of Trinity Vacation, 1863, in consequence of severe indisposition, resigned his office. He died on the 22d January, 1864.

Sir Roundell Palmer, her Majesty's Solicitor-General, was appointed Attorney-General.

Robert Porrett Collier, Esq., one of her Majesty's Counsel, was appointed to the office of Solicitor-General, and shortly afterwards received the honour of Knighthood.



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DURING THE PERIOD EMBRACED IN THIS VOLUME.

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# CASES

IN THE

## HOUSE OF LORDS.

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ENOHIN *v.* WYLIE.

1862. March 7, 10, 11 ; April 3.

IWAN WASSILYEWITCH ENOHIN and others, *Appellants*.

ANNE WYLIE, WALTER WYLIE, and others, *Respondents*.

*Will. Foreign Law. Probate. Intestacy. "Capital." "Moveable Property." Recital of Intention. Restrictive Words. Jurisdiction. Evidence.*

The law of the domicile of a testator governs questions of testacy and intestacy, of the construction of the will, and of the rights of those who claim to be his next of kin.<sup>1</sup>

Where, therefore, a will was made by an Englishman, who died domiciled abroad, and the foreign Court had granted probate of the will, it became the duty of the English Court of Probate (some of his personal property being situated in this country), to grant ancillary probate to the foreign executors. It had no right to constitute itself a Court of construction.

The Court of Chancery, in like manner, was not entitled to entertain an administration suit founded on a question relating to the construction of the will, and the foreign executors might properly have excepted to its jurisdiction.

But parties thus entitled to insist on the authority of the Court of the domicile, may by their conduct give to the English Court authority and jurisdiction to construe the will, and administer the estate, so far as funds and persons in this country are concerned.

A., a British subject, domiciled at St. Petersburg, made a will in the Russian form and Russian language, by which he expressed a desire "to dispose of all my moveable and immoveable property." After giving legacies, and directing his household property and estates in Russia to be sold, he went on, "The

<sup>1</sup> *Doglioni v. Crispin*, Law Rep. 1 H. L. 304 ; *Partington v. The Attorney-General*, Law Rep. 4 H. L. 104, 107.

money proceeds of all the above, as also the whole of my capital which  
 \* 2 shall remain with me after my death in ready money and in bank billets” \* [a bank debenture peculiar to Russia] “belonging to me, shall be divided into ten equal parts”; two of which he devoted to debts and funeral expenses; and said, “of the remaining eight parts, I intend afterwards making a detailed disposal”; but if he did not (and he never did), they were to go to charitable purposes. He then named executors, and concluded thus, “And as all my moveable and immoveable property is mine own, honestly acquired by myself, nobody has a right to interfere with my dispositions and contest the same, and no one has a right to interfere with or contest the dispositions and proceedings of my executors.” The testator had large funds in the English consols: *Held*, that the executors did not take these consols under the general bequest in the will; and *Held* also, that as to these consols, there was an intestacy.

The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors, is the only admissible evidence of the will.

IN 1854, Sir J. Wylie, born in Scotland, but who had for many years been domiciled in Russia, was one of the court physicians there, and had been created by the Prince Regent, at the desire of the Emperor Alexander, an English baronet, made his will in the Russian form and in the Russian language, in which were to be found the following passages: “I dispose of all my moveable and immoveable property, honestly acquired by myself, in the following manner.” He then described house property in St. Petersburg, his household furniture, &c. there, and farms and country houses in the neighbourhood, all which, with the peasants, “excepting only those of my serfs who, for their faithful and zealous services to my person, shall be set free,” he desired to be sold. “The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money, and in bank billets belonging to me, shall be divided into ten equal parts; two of these I destine to be employed in arranging a decent funeral and erecting a monument to  
 \* 3 \* me, and also in acts of charity in my commemoration, at the discretion of the executors. Of the remaining eight parts, I intend afterwards making a detailed disposal; but should I, from any cause whatever, not dispose of all the capital assigned for these eight parts, or of any parts or fractions thereof, the sum that would remain then undistributed I humbly lay at the feet of His Imperial Majesty,” to be employed in commemoration of the Emperors Paul and Alexander, and the Grand Duke Michael, “for some establishment of public or charitable benefit which

should bear my name." He then went on to say, "As executors of this my testament, and of the will which shall hereafter follow as a supplement to this testament, I name" the appellants, "with the condition that my property shall remain until its final sale under the administration of the titular counsellor, Ewfanôff" (one of the three executors named), "to whom I grant full power to set free those of my peasants who are now, and who shall remain faithfully and zealously in my service at the time of my death"; . . . . "for which purpose I have given to Ewfanôff my separate instructions. Therefore, any other disposal made previous to this one concerning my moveable and immoveable property shall be considered as null and void." . . . . "And as all my moveable and immoveable property is mine own, and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same under any pretence whatever, and likewise no one has a right to interfere with or contest the dispositions and proceedings of my executors."

The testator died a bachelor at St. Petersburg, on the 22d February, 1854, possessed of a considerable estate in Russia, and also entitled to 67,864*l.* Three per Cent. Consolidated Bank Annuities.

Executors were duly appointed in Russia. In February, \* 1855, Walter Wylie, a brother of the testator, obtained, from \* 4 the Prerogative Court at Canterbury, letters of administration to the estate and effects of the deceased. On the 15th March, 1855, Anne Wylie (a daughter of another brother, but who was then dead) filed a bill in Chancery against Walter Wylie, alleging herself to be entitled, under the law of Scotland, or England, or Russia, as one of the next of kin of the deceased, to a share of his effects, but that Walter Wylie alleged there were difficulties as to the mode in which the estate ought to be distributed, and that he desired the direction of the Court of Chancery thereon, and she prayed for an account. On the 9th June, 1855, Vice-Chancellor Wood made an order directing inquiries as to the domicile of the testator, and ordering accounts, and payment into the Bank to the credit of the Accountant-General in the cause. In the course of making these inquiries it was discovered that the testator had made a will, and that executors had been appointed. The chief clerk made his certificate, and, on a hearing before the Vice-Chancellor, notice of the suit was ordered to be given to the ap-

pellants as executors. On the 3d November, 1856, the appellants instituted proceedings in the Prerogative Court of Canterbury for revoking the letters of administration granted to Walter \* 5 Wylie.<sup>1</sup> By a decree of the 20th April, 1858, \* the letters of administration granted to W. Wylie were revoked, and probate of the will was granted to the appellants, the Judge of the Probate Court intimating his opinion, that, on the true construction of the will, all the testator's property in England, as well as in Russia, had been made the subject of disposition, and passed to the executors. On the 15th June, 1858, Anne Wylie filed a bill against the appellants and Walter Wylie, alleging that the testator died intestate as to all his property not within the Empire of Russia, and that the expression "bank billets," in his will, referred exclusively to money deposited in the Russian banks; and praying for an account and administration of his English property, and for general relief. This construction was disputed by the executors, affidavits were filed on both sides, and there was much contest whether the words in the English translation of the will, "capital in ready money,"

<sup>1</sup> Evidence was taken as to the translation of the will, and as to the law of Russia. It was proved, that the words "bank billets" described securities given by Russian banks when money was deposited with them, to return such moneys, interest thereon becoming due after six months' deposit. The word "capital" was stated to have as large a meaning in Russia as in England. The words "ready money" were a proper translation of the original, and had the same meaning as in English. As to the law, it was stated on affidavit by Russian advocates, that "executors appointed by wills are bound to fulfil the contents of the same exactly, and the laws of Russia do not confer on them any other powers than in regard to the property mentioned in the disposing part of the will. Consequently any residue of property not disposed of by the will, must be regulated according to the law regulating intestate succession."

"That the law of the Russian Empire authorises the carrying of wills into execution, either by the executors or heirs according to the wish of the testator. The testator having expressed his wish by the appointment of executors, they are, according to the Russian law, perfectly justified in claiming and assuming administration of all the testator's property whatsoever its nature, and wheresoever situated at the time of the testator's death, whether in Russia, England, or any other countries, in administering such property, and requiring the delivery thereof to them for their management and administration conformably to the dispositions of the testator." Some of the Russian witnesses expressed an opinion, that the general bequest in the will would pass all property whatever, including the stock in the English funds, while others stated, that "as he had specified parts of his property, and declared what was to be done with those parts, he must be taken to have died absolutely intestate as regards the parts not specified, particularly as to the money invested in British funds."

ought not to be "ready capital," or "capital in readiness." The cause was heard before Vice-Chancellor Wood; and his Honour, by a decree, dated 17th December, 1859, declared that the testator died \*intestate as to his property in the public funds of \* 6 Great Britain, and accounts were directed. On appeal to the Lords Justices, this decree was, on the 17th February, 1860, affirmed.<sup>1</sup> These decrees were the subjects of appeal.

*Sir H. Cairns* and *Mr. Karslake*, for the appellants. — The whole property of the testator here passed to the appellants on the trusts of the will. A recital by the testator that he has disposed of all his moveable and immoveable property in a particular way, is as effective for such a purpose as the use of particular words of disposition. The appellants here have received the grant of probate, and that is decisive of their rights as executors in this country. It is especially so since the point raised in the Probate Court was that the will only affected property in Russia. That contention was answered by the grant of probate, as well as by the declared opinion of the Judge. It was, therefore, *res judicata*, and that by the Court which alone had jurisdiction in the matter, before the case reached the Court of Chancery, and ought there to have been so treated. Then, as executors, the appellants were entitled to take the whole property wherever situate, and the will expressly gave it to them free from contest or control by anybody else. The case of *Ellcock v. Mapp*<sup>2</sup> does not impeach the claim of the appellants. There it was decided that the devise of all the estates, real and personal, to the executor, did not vest in him a beneficial interest in the residue, but that was because the devise was expressly made "to and for the following uses," &c. The executor, therefore, only took the property as a trustee, and had no absolute power \* of disposal over it as he has here. The \* 7 mode of construing a will like the present is stated in *Waite v. Combes*,<sup>3</sup> when the general context of the will gave to the word "moneys" a meaning equivalent to that of the whole personal estate. The expression here, "all my property, moveable and immoveable," is much stronger, and includes every thing. Even an inaccurate recital is sufficient to create a gift. *Jordan v. For-*

<sup>1</sup> 1 De G., F. & J. 410. See the case in the Probate Court, 1 Swab. & T. 118.

<sup>2</sup> 3 H. L. Cas. 492.

<sup>3</sup> 5 De G. & S. 676.



*tescue*.<sup>1</sup> In *Bridges v. Bridges*,<sup>2</sup> a description of what stocks the residue consisted of was not allowed to restrict the gift of the residue to the three stocks specially described, but passed the whole residuary personal estate; and in *Chalmers v. Storil*,<sup>3</sup> the Master of the Rolls adopted and acted on this decision. In *Cambridge v. Rous*<sup>4</sup> a gift of residuary property was held to pass all property not specifically disposed of, and in *Boys v. Morgan*<sup>5</sup> the testator merely said, "I guess there will be found sufficient in my banker's hands to defray debts and expenses, which I hereby desire E. M. to do, and to keep the residue for her own use and pleasure"; and this was held to be a gift not merely of the residue of what was in the banker's hands, but of the general residue of the personal estate. Here the case is stronger, for the will contains words sufficient to pass all the personal estate, including this very English stock. "The whole of my capital" are words sufficient for that purpose, and are not cut down by the words which follow. The words, "ready money," have been held to pass a balance at a banker's, *Parker v. Marchant*,<sup>6</sup> and also money in a savings bank, *Re Powell's Trust*,<sup>7</sup> \* and the principle of construction in these cases applies not merely to the terms of the will, but to the surrounding circumstances, and the state of the parties, *Pasmore v. Huggins*.<sup>8</sup>

The Russian law is not different in this respect from the English. Indeed, it is even more favourable for the appellants, for it does not recognise some of our distinctions as to different sorts of property. Now, it is clear that this will, made in Russia, which was the place of domicile of the testator at the time of his death, ought to be construed by the Russian law.

*Mr. Rolt*, and *Mr. W. M. James* (*Mr. Daniel*, *Mr. T. H. Hall*, and *Mr. Neish*, were with them), for the various respondents. — As to the property in the English funds there is an intestacy.

It may be admitted that the appellants are rightfully entitled to probate as the executors of the deceased. And there is no doubt that as to the matters over which the will gave them authority, it

<sup>1</sup> 10 Beav. 259.

<sup>2</sup> Vin. Abr. Devise (O. b), 295, pl. 13; Roper on Legacies, 4th ed. 288.

<sup>3</sup> 2 Ves. & B. 222.

<sup>4</sup> 8 Ves. 12.

<sup>5</sup> H. R. V. Johns. 49.

<sup>6</sup> 3 Mylne & C. 661.

<sup>7</sup> 21 Beav. 103.

<sup>8</sup> 1 Younge & C. Ch. 290; affirmed, 1 Phill. 356.

was the desire of the testator that their conduct should not be questioned. But the last clause in the will did not enlarge the previous bequests, and neither by implication nor by express terms was any authority given to them over the English funds.

[THE LORD CHANCELLOR. — A man makes a will according to the law of the country in which he is domiciled ; he has some personal property in a foreign country ; that foreign country has the duty of granting an ancillary administration which ought to be granted to those entitled by the law of the country of the domicile ; can the Court of this foreign country constitute itself into a Court \* of construction ? When it has granted the ancillary \* 9 administration, is it not *functus officio* ?] Not necessarily, and certainly not in this case ; for these executors having thought fit to rest their case on the simple question whether the whole of the property was disposed of by the will away from next of kin, are not entitled now to raise any other question. Then supposing that the question of construction may be discussed, it is clear that the decision of the Vice-Chancellor was right. The judgment of the Court of Probate on the construction was in itself erroneous, and at all events it had no authority to bind the Court of Chancery. The Court of Probate merely determines (though that itself may afterwards be disputed in the Court of Chancery) that a paper is a will, and that certain gentlemen named in it are executors ; but it cannot decide on the construction of the instrument. [THE LORD CHANCELLOR mentioned *Barrs v. Jackson*.<sup>1</sup>] The Court of Probate grants administration to the next of kin if there is no executor ; if there is an executor it is not bound to do so, but may act according to its judgment and discretion in the particular case, and one consideration to influence its decision is, who is entitled to the residue. [THE LORD CHANCELLOR. — The Spiritual Court has authority to distribute without granting administration. Does not the finality of its decision rest on that ground ?] The mere grant of administration by no means concludes the question of construction ; the Court of Chancery still has the right to determine that. Now on the construction it is clear that there are no words of gift of residue to the executors ; there are merely words appointing them to their office. They have thus the right to get the property into their hands, but that is merely for the purpose \* of administering it according to the intentions of the testa- \* 10

<sup>1</sup> 1 Phill. 582.

tor. That is the limit of their authority, and the decision in the Court of Probate is not binding on the Court of Chancery. *Hughes v. Turner*<sup>1</sup> is an instance of that. [LORD CHELMSFORD. — In that case it was necessary for the Court of Chancery to decide whether the will was in due execution of a power.] And by the 23d section of the Probate Act<sup>2</sup> it is clear that the Probate Court can only determine who may receive grant of probate, but not what are the rights of the parties under the will. The decision in this case made in the Probate Court cannot affect the rights of those parties who have since become parties to the suit in Chancery, but were not before the Probate Court at all.

Then as to the translation of the will: that does not bind the respondents.

[THE LORD CHANCELLOR. — We think the copy of the will contained in the Probate is the only admissible evidence of the will.]

Then as to the construction. Give the largest meaning to the word "capital," still it is restricted by the remaining words, "the whole of my property in ready money." But the word "capital" in itself would not carry every thing; it would not carry a library or diamonds. Then of course with the words "ready money" following it, it cannot be made to include British funds. The words "billets in the bank" are appropriate enough in Russia, and have a particular meaning there, but they are utterly inapplicable to property in the funds here. Nay more, "capital with me" would not here carry property in the funds, though the testator had at the time the transfer ticket in his own pocket.

\* 11 It is true that ready \* money has been held to carry a balance at a banker's, *Parker v. Marchant*,<sup>3</sup> but that is because the banker only holds the money on condition of paying it on demand. In *Sadler v. Turner*,<sup>4</sup> there was a declaration of an intention to dispose of "my temporal estate"; but even after that, the bequest of the residue of my "fortune in India" was held not to convey the testator's property in England, though part of it had been remitted here between the time of making the will and of the death. The case of *Cambridge v. Rous*<sup>5</sup> does not affect the present, for there the enumeration of particulars was defective, and the Court merely supplied the deficiency, for it was clear that

<sup>1</sup> 4 Hagg. Eccl. 30, 3 Mylne & K. 666.

<sup>4</sup> 8 Ves. 617.

<sup>2</sup> 20 & 21 Vict. c. 77.

<sup>5</sup> 8 Ves. 12.

<sup>3</sup> 1 Younge & C. Ch. 290, 1 Phill. 356.

the testator there supposed he had disposed of every thing. Here, on the contrary, the testator distinctly speaks of an intention to supplement this testamentary paper by a formal will. He never executed that will, and thus he left no declaration of his will with respect to the property in England. What he has disposed of is mentioned in a clear and specific manner; what is not so mentioned, is undisposed of, and whether present or not to his mind when he made the will, cannot by implication be introduced into the will, for that would be to make a will for the testator. [THE LORD CHANCELLOR. — The testator gives his executors unlimited power; he has expressed his intention to deal with all his “moveable and immoveable property,” and the Probate Court has found that the executors take all his property of whatever kind. What is the effect of all this in the present state of the law?] In *Juler v. Juler*,<sup>1</sup> the words were, “I make H. my whole and sole executor of all the various properties I may be in possession of at my death”; and \* under the 11 Geo. 4 \* 12 and 1 Wm. 4, c. 40, he was held to be a trustee of the residue for the next of kin. The executor is bound to prove from the testamentary instrument a distinct intention that he is to take beneficially. [THE LORD CHANCELLOR. — Is not the declaration that no one shall contest the decision of the executors as to the disposal of the property, equivalent to giving them an absolute power of disposing of it, and do not these words in this will affect the whole of the property?] No, it is the disposition, by the executors, *quâ* executors, that is the mere management of it. [THE LORD CHANCELLOR. — He uses the same words as to not contesting his dispositions of the property, and not contesting the dispositions of the executors. It cannot mean mere management in his own case, and therefore not in theirs.] But he uses the word “proceedings” with regard to the executors; and all that he meant to say was, that he had the fullest confidence in their rightful discharge of the duties of their fiduciary office; still their discharge of those duties may be questioned, *Gibbons v. Dawley*.<sup>2</sup> The very vagueness of the words is itself a reason in favour of the claim of the next of kin, *Fowler v. Garlike*.<sup>3</sup>

*Sir H. Cairns* replied.

<sup>1</sup> 29 Beav. 34. See also *Saltmarsh v. Barrett*, 29 Beav. 474.

<sup>2</sup> 2 Cas. in Ch. 198.

<sup>3</sup> 1 Russ. & M. 232.

April 3.

THE LORD CHANCELLOR (LORD WESTBURY). — In this case the question that has been argued at the bar of your Lordships' House is as to the true interpretation and construction of the will of Sir James Wylie. He was a resident in St. Petersburg for more than fifty years down to and at the time of his decease. He was the court physician there, and was beyond all question domiciled in Russia at the time of his death. His will was made \*13 in the Russian language, and duly authenticated by \*the executors, who were named in it, in the proper Court in Russia. He left considerable property in Russia and also property in the 3l. per Cent. Consolidated Funds in England.

It is necessary, therefore, to ascertain, and to define with accuracy, how it happens that a question of this nature, namely, the construction of the will of a testator dying domiciled abroad, upon a matter relating to personal estate, comes to be discussed in the Courts of this country. I am the more desirous of doing so, because at first sight this case appears to be of an anomalous character, and I think it important to define very accurately the grounds upon which I shall submit to your Lordships that your decision ought to be founded, in order to prevent the possibility of of its being supposed that there has been, in the proceedings in the Courts of this country, any departure from acknowledged and established rules.

I hold it to be now put, beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the Judge of the domicile. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicile belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator, is the prerogative of the Judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort.

To these general rules must be added a remark on the great danger and inexpediency of a Court of a foreign \*14 \*country taking upon itself the task of interpreting the

will of a testator which is written, not in the language of that country, but in the language of the country of the domicile. I entirely adopt upon this point the opinion of Lord Lyndhurst in the case of *Trotter v. Trotter*.<sup>1</sup>

From these general rules I should have derived, but for the conduct of the parties, the following conclusions as applicable to the present case. First, that when the Court of Probate was satisfied that the testator died domiciled in Russia, and that his will containing a general appointment of executors had been (as it was) duly authenticated by those executors in the proper Court in Russia, it was the duty of the Probate Court, in this country, at once to revoke the former letters of administration which had been granted, and to clothe the Russian executors with ancillary letters of probate, to enable them to get possession of that personal estate, which (in fact though not in law) was locally situate in England.

In my opinion, the Probate Court, as to those purposes, had nothing to do with the construction of the will. That Court, however, assumed an original jurisdiction, and having put a construction upon the will, that it included and passed the English funded property of the testator, on that ground decreed probate of the will to be granted to the Russian executors.

The appellants, the executors, being thus fully constituted the representatives of the testator, it was, in my opinion, the duty of the Court of Chancery to transfer to them the funded property of the testator, which the Probate Court had taken out of the hands of the former administrators. The Court of Chancery had no more right than the Court of Probate to exercise the jurisdiction of putting a construction on the will of the testator, and \*making a partial administration of his estate in this \*15 country. It, however, did so, and arrived at a conclusion as to the true construction of the will, which was the very opposite of that which had been determined by the Court of Probate to be the true construction.

Now, the utmost confusion must arise if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first of declaring who is the personal representative, and next of interpreting the will, and distributing the personal estate situate within

<sup>1</sup> 4 Bligh, N. S. 502, 3 Wils. & S. 407.

its jurisdiction according to that interpretation. An Englishman, dying domiciled in London, may have personal property in France, Spain, New York, Belgium, and Russia ; and if the course pursued by the Court of Probate and the Court of Chancery in the present case should be adopted by the Courts of those several countries, there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there were countries in which he was possessed of personal property.

It is unnecessary to dwell on the evils which would result from this conflict of jurisdictions. It was to prevent them that the law of the domicile was introduced and adopted by civilized nations. I am, therefore, of opinion that the executors might have excepted to the jurisdiction of the Court of Chancery as a Court of construction and administration ; they might have insisted that it was the duty of the Court to hand over to the executors the clear English personal estate, and to remit the next of kin to the Court of the domicile of the testator. But the executors did not do so : *cuique competit renunciare juri pro se introducto*. They made no objection to the jurisdiction of the Court of Chancery ; on the contrary, they condescended with the next of kin on the \*16 \* question of construction, and, without objection, entered with them into the arena of the Court of Chancery for the purpose of contesting the true interpretation and effect of the will. Both sides agreed that the will must be construed according to Russian law, and both sides adduced evidence of what that law was, for the purpose of assisting the Court in the work of interpretation.

When Vice-Chancellor Wood had arrived at a construction adverse to the executors, they presented a petition of rehearing to the Court of Appeal in Chancery, and raised no other question than that of construction. And they have now come with a final appeal to your Lordships ; and by their petition of appeal and printed case, they complain of the decree of the Court below, "because upon the true and just construction of the will of the said Sir James Wylie, baronet, the beneficial interest in his property in the public funds of Great Britain was not undisposed of, but on the contrary passed to the appellants upon the trusts of the will." I am, therefore, of opinion, that the appellants have, by their conduct and assent, clothed the Court of Chancery with full authority and jurisdiction to construe and declare the true inter-

pretation of this will, and that the only question for your Lordships to determine is the accuracy of that interpretation.

Now the question remains as to the effect of the appointment of an executor by the Court in Russia, and whether undisposed of personal property vests in the executor beneficially or is held by him upon the trust for the next of kin of the testator.

Upon that point both sides have entered into evidence, and I think that upon an examination of that evidence your Lordships will agree with me in the conclusion that there is in reality no material difference or discrepancy, \* in the views of the \*17 advocates and the professional gentlemen who have been examined on either side. The result which I deduce from the testimony they have given is this, that although a general appointment of executors comprehends the universal personal estate of a testator, yet that the estate vests in the executor for the purposes only of the dispositions made by the will, and that, if any part of the personal estate is undisposed of by the will, the executor holds that property in trust for the next of kin of the testator.

There is no doubt here who are the next of kin according to the law of Russia. That has been ascertained and proved by the evidence. [His Lordship referred to the evidence, see *ante*, p. 4 n.]

The question, therefore, is reduced to the interpretation of the will of the testator. That is a point which has been argued with great zeal and ability at the bar of your Lordships' House. I must confess that for some time my mind fluctuated, principally with regard to the interpretation that ought to be put upon the concluding portion of the passage, where he says, "As all my moveable and immoveable property is mine own, and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same, under any pretence whatever, and likewise no one has a right to interfere with or contest the dispositions and proceedings of my executors." But upon full consideration of that particular part in connection with the other portion of the will, I think the words that I have read must be regarded as amounting to no more than an emphatic expression and declaration of the plenary power which he considered and desired should exist in the person holding the fiduciary office of executor. I do not consider that these words involve any disposition of that part of the personal estate \* of the testator consisting of the \*18 English property, unless the English property is found to be



comprehended within the words of the description contained in the prior part of the will.

Now, my Lords, upon an examination of the words of the disposition in the prior part of the will, I entirely accede to the view that has been taken in the Courts below, that that description for the purposes of disposition does not extend beyond the real and personal property locally situated in Russia. I am compelled, therefore, to adopt the conclusion which has been arrived at by the Vice-Chancellor and also by the Lords Justices, concurring as I do entirely in the observations made by Lord Justice Turner, that the property of the testator which he possessed in the English funds, is not described in any part of this will for the purposes of disposition, and that in fact the testator died intestate with regard to that portion of his property.

My Lords, being particularly anxious that it should be known in what manner a question of this kind has come within the jurisdiction of the Courts below, and ultimately within the jurisdiction of this House, I have entered into an explanation of the facts and history of this case, and I have no hesitation in advising your Lordships to affirm the decision which has been given.

LORD CRANWORTH. — My Lords, the question in this case is as to the mode in which the Court of Chancery ought to deal with a large sum of consols which was standing in the name of Sir James Wylie at his death, and to which he was absolutely entitled, for his own sole use and benefit. He was a British subject, but he

had long been domiciled in Russia, where he died a bachelor  
\* 19 in 1854. The rules of law \* applicable to such a case are, as

I conceive, well established; personal property in this country belonging to a foreigner, or to a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country. If he has died intestate, administration will be granted here, limited to the personal estate in this country. If he has left a will, valid by the law of his domicile, and has thereby appointed executors, probate of that will must be obtained here. There may be cases of a more special nature, but for our present purpose they may be disregarded. In every case the succession to personal property will be regulated not according to the law of this country, but to that of the domicile.

Where there is such a will, and probate of it has been obtained

here, the duty of the Court in administering the property supposing a suit to be instituted for its administration, is to ascertain who, by the law of the domicile, are entitled under the will, and, that being ascertained, to distribute the property accordingly. The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicile. This was the mode in which the law was laid down by Lord Cottenham in this House in the case of *Preston v. Lord Melville*.<sup>1</sup>

Applying these well-established rules to the present case, we have to deal with a will, valid by the law of the domicile, appointing executors generally, and proved by them in our Court of Probate. By virtue of the probate, they, as a matter of course, obtained possession of the consols in question. The duty of the Court is to take care \* that they distribute this large fund \* 20 according to the provisions of the will; all debts having been paid.

In the first place, therefore, it is necessary to construe the will, to ascertain whether, by its terms fairly interpreted according to the construction that would be put upon them in Russia, any specific disposition is made of this sum of consols. I see nothing in this case which suggests the conclusion that there is any thing in the laws of Russia leading to an interpretation different from that which the will would receive in this country.

It was argued that this sum of consols might fairly be understood as included in the description of "the whole of my capital which shall remain with me after my death in ready money, and in bank billets belonging to me." But I cannot accede to that argument. It may be that if the testator had given the whole of his capital which should remain with him after his death, that word "capital" would have been wide enough to include his property in the British funds. But what he gives is not the whole of his capital, but the whole of his capital "in ready money and in bank billets." Now a sum of consols cannot be described as ready money, and the evidence shows clearly that bank billets are a sort of bank notes well known in Russia, which circulate as cash, but which carry interest after a lapse of six months. It is impossible to hold that they could have been understood as including a sum of consols in this country.

<sup>1</sup> 8 Clark & F. 1.

But it was contended that whatever might have been the meaning of the words "capital in ready money and bank billets," if they had stood alone, yet here the context shows that the testator used them in a wider sense, in a sense which would comprehend all his moveable property. He begins his will by saying, "I \* 21 make this \* will, by which, in case of my death, I dispose of all my moveable and immoveable property." This, it was argued, shows that he must have understood every thing to be included under the word "capital," and so that the mention of ready money and bank billets could not have been intended to qualify the generality of the word "capital," but merely to express by way of enumeration some of the matters of which the capital consisted. I do not feel the force of this argument. The words relied on show, indeed, an intention to dispose of every thing. But if there are no words to be found in the will which, reasonably interpreted, include a particular species of property, the prefatory words can only be considered as indicating an intention which the testator has not fulfilled. This remark applies with peculiar force to the present will, to which the testator expressly states, he intended to make a further will by way of supplement. I cannot, therefore, attribute to these prefatory words the effect contended for. It was then further argued, that our Court of Probate, by admitting the executors to a general probate of the whole will, has established conclusively that the whole personal estate, including, of course, the consols, became vested in the executors. And then it was contended that the testator, by the concluding passage of his will, has implicitly given to them a beneficial interest in the whole by forbidding any one to question their dispositions of it. But, in the first place, I do not read the passage in question, in the latter part of the will, as meaning more than an expression of the testator's opinion and feeling that no one had any right to complain of the dispositions he had made, or of his executors, for carrying them into execution ; to complain, that is, of his moral right. But, further, I think it clear, from the evidence of the Russian \* 22 advocates, on both sides, that there is no principle \* of the Russian law which gives any beneficial interest to executors. The advocates consulted by the respondents state expressly, that executors are bound to fulfil the directions of the will exactly, and that they have no other powers than in regard to the property mentioned in the disposing part of the will, and consequently that

any residue not disposed of must be regulated by the laws relating to intestacy. The advocates consulted by the appellants do not express any opinion at variance with this ; for though they consider that the consols ought to be delivered to the executors equally with the testator's other property, that opinion is expressly founded on the assumption that they were included in the bequest of the " capital." There is nothing in this opinion at variance with the doctrine that executors take the property put under their control merely for the purpose of executing the testator's directions concerning it, and so that, if there are no such directions, it must be distributed as an intestacy.

If this had been the will of an English subject domiciled in England, I should, without hesitation, have come to the conclusion that the testator had died intestate as to the fund in dispute ; and the evidence to which I have referred satisfies me that on this point there is no difference between the law of Russia and that of England.

It follows that the property goes to those who are entitled to it by the laws of Russia, as on an intestacy. I think that the decree rightly declared that the testator died intestate as to his beneficial interest in all his property in the public funds of Great Britain, and properly directed the inquiries consequent on that declaration, and therefore that the decree below was right, and that the appeal ought to be dismissed.

\* LORD CHELMSFORD. — The appellants, in their argument \* 23 addressed to your Lordships, contended in the first place that the decree appealed from is erroneous, because the question has been determined in their favour by the Court of Probate having granted probate to them. They say that the respondents in that Court put their case on the ground that there was no gift of the stock in the English funds to the executors, but an intestacy as to this property, and that the Judge, by granting probate, must have decided that there was a gift of the stock to the executors. There can be no doubt that the respondents founded their opposition to the grant of probate upon what they alleged to be the law of Russia, that executors have nothing to do with property undisposed of by the will, which must be regulated according to the law of intestate succession, without their interference. The appellants, on their part, insisted that the stock was comprised in

the will, and ought to be delivered equally with other property to the executors "for employment conformably with the destination at the wish of the testator." The Judge was therefore invited by both parties to assume the office of a Court of construction; but they could not confer upon him a jurisdiction which did not belong to him. His sole duty was to ascertain whether the persons seeking to revoke the letters of administration granted to Walter Wylie, and to obtain probate of the will, were universal or limited executors. That point being settled, determined the right to probate. The appellants further insisted that the probate having given the executors the right to receive the stock in the English funds, the Court of Chancery ought to have ordered it to be transferred to them, to be disposed of according to the directions of the

Russian tribunals. But the fund is within the jurisdiction \* 24 \* of the Court; the rights of the parties, according to the law of the domicile (assuming an intestacy), have been ascertained; the next of kin are, for the most part, in this country; and why, under these circumstances, the property should be remitted to the forum of the domicile, in order that it should be sent back again to be distributed, and why the Court should be incompetent to act effectively and finally in the suit which has been instituted, by decreeing a distribution amongst the several persons entitled, and transmitting to Russia the shares of the next of kin resident there, I am unable to comprehend.

The only real question in the case is whether there is an intestacy as to the stock, or whether it passed by the will. This question must be decided by the intention of the testator, to be gathered from the language he has employed to express it. From the introductory words in the will, there seems to be little reason to doubt that the testator had made up his mind to dispose of all his property moveable and immoveable. In order to effectuate this object a Court of construction would be warranted in giving an extended meaning to his words, so as to make them embrace property, which ordinarily would not pass under the specific description used. But, unless we can arrive, with something like moral certainty, at the conclusion that the testator meant to employ his words in a sense different from that which they commonly import, we are not at liberty to attribute to them another meaning, merely for the purpose of satisfying a general intention expressed at the

outset of his will, and which he might afterwards have omitted to carry out in the subsequent dispositions.

It does not appear to me, that much stress ought to be laid upon the passages in the latter part of the will, in one of which the testator speaks of "any other disposal made previously concerning my moveable and immoveable \* property," which is \* 25 merely a clause of revocation of any former dispositions, of which we know nothing, and in the other, beginning "As all my moveable and immoveable property is my own and honestly acquired," where he protests against the right of any one to interfere with the disposal of his property at his own free will and pleasure. Nor do I think that the words, "No one has a right to interfere with or contest the dispositions and proceedings of my executors," in this clause, which begins with a reference to all his moveable and immoveable property, can (as has been suggested) be construed as a gift of the whole property to the executors, without at the same time assuming that the whole property previously passed. The executors have duties to perform with respect to the property which is unquestionably contained in the will and the words their "dispositions and proceedings" would be satisfied, whether the whole or not the whole of the property is disposed of.

We come then to the few words in the will upon which the question arises. We must of course bring to their interpretation the persuasion that the testator had begun his will with an intention of disposing of every thing which he possessed. If then we had found in the will a description of a portion of his property as "ready money" without more, we might, in deference to the evident intention of the testator to make a general disposition of all his property, have followed the decision of Vice-Chancellor Parker in *Waite v. Combes*, and have given a latitude of meaning to the words to make them comprehend stock in the English funds. But when we find a bequest expressed in these terms, "the whole of my capital which shall remain with me after my death in ready money," I do not see how it is possible, without doing the greatest violence to language, to give them the \* enlarged \* 26 meaning which has been contended for. Admitting to the fullest extent the duty of a Court of construction to find out the intention of a testator, and to give effect to it when discovered, and not doubting that in this case the testator had the general in-

tention attributed to him, I am compelled to say that his object has been frustrated by his use of language of so specific a character as to be incapable of any other meaning than that which the words themselves convey.

For these reasons I think the decree appealed from ought to be affirmed.

*Decree affirmed, and appeal dismissed with costs.*

Lords' Journals, 3d April, 1862.

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TYRRELL v. BANK OF LONDON.

1862. February 14, 17, 18, 20, 27.

TIMOTHY TYRRELL,	. . . . .	<i>Appellant.</i>
The BANK OF LONDON and SIR J. V. SHELLEY	} <i>Respondents.</i>	
and others,		. . . . .

*Solicitor and Client. Duty and Rights of Solicitor. Interest on Money ordered to be restored. Pleading. Practice.*

It is an established rule that a solicitor shall not, in any way whatever, in respect of any transactions in the relation between him and his client, make gain to himself, at the expense of his client, beyond the amount of his just and fair professional remuneration.

T., a solicitor, had a private arrangement with R., by which he was to receive from R. a share in certain property then belonging to R., and to share the profit to be obtained from the sale of that property. In his character of solicitor, T. acted for clients (a banking company) in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it:—

*Held*, affirming the decree of the Court below, that T. was to be treated as a trustee for his clients in respect of his share of so much of the property as they had actually purchased; but a part of the decree, which had declared him to hold the unsold property also in trust for his clients, was varied; and, instead thereof, the value of T.'s half of that property was directed to be taken into account in ascertaining which was due from him to his clients.

\*27 \* T., having made a large profit on the sale, was ordered to pay back the amount of this profit with the full amount of interest given in cases of a breach of trust, namely, 5 per cent.

To the bill on the part of the trustees of the bank, impeaching the transaction, R. had been made a defendant. The Court below dismissed the bill as against him. This was erroneous, but no appeal having been lodged against this part of the decree, no order could be made upon it.

THIS was an appeal against a decree of the Master of the Rolls. The appellant was a solicitor; the respondents are the persons constituting the Bank of London, and the trustees for that bank. The late Mr. Moxhay was the owner of premises in the city of London, with a southern frontage in Threadneedle Street, extending backwards about one hundred and forty feet, and having two other frontages, one in Old Broad Street and the other in Cushion Court. Mr. Moxhay had erected on a part of this property the building known as the Hall of Commerce. The property in question was mortgaged by him to a Mrs. Campbell for 40,000*l.*, and, on his death, she foreclosed. In 1854, nine persons, of whom one E. R. Read was the chief, united together to buy this property, which Mrs. Campbell agreed to sell to them for 49,200*l.* The agreement for the sale was made in September, 1854, and a deposit of 1000*l.* paid; but, in December of that year, Mrs. Campbell consented to enlarge the time for completing the contract till June, 1855.

On the 15th January, 1855, the appellant, Mr. Paine one of his partners, and Mr. Scott, met together at the appellant's office, for the purpose of considering a project for the establishment of a new Joint Stock Banking Company. They agreed upon a scheme; and it was stated in the minutes of the meeting, that "Messrs. Tyrrell, Paine, and Layton expressed their willingness to undertake the office of solicitors to the bank." In the same \*minutes \*28 it was recorded, that "Mr. Scott expressed his willingness to undertake the office of secretary to the bank." It was also resolved, "that the central, or head office be in the city of London." At this, and at other meetings of the promoters, the appellant acted as their chairman. On the 19th January, the appellant applied to Sir J. V. Shelley to be chairman of the projected bank. He consented, and from that time the appellant and Read severally acted as solicitor and as secretary to the newly formed company. On the 3d February, 1855, Mr. Vigers, a surveyor, offered the whole of the premises to the solicitors engaged in forming "The City Bank," at 55,000*l.*; but they could not then treat for the same. On the 7th February, at a meeting of the coadventurers, Read objected to this offer, and, by paying 150*l.* to each of the coadventurers who had paid 100*l.*, purchased up their interest, and claimed to be the sole person entitled to the property under the agreement with Mrs. Campbell. On the 6th February he had spoken about



the property to Tyrrell, and expressed his wish that it should be offered for sale to Tyrrell's projected bank. On the 8th February, Read had a conversation with Tyrrell about this property, and, as Tyrrell stated in his answer, it was agreed, "that we should be jointly and equally interested in the said agreements of the 20th September and 23d December, 1854 (except as to a messuage and premises comprised therein, known as No. 8 Old Broad Street, in the entirety of which Read was to be entitled for his own benefit), and that the same agreement should be performed, and the purchase completed, and the premises altered, let, resold, or otherwise, at our joint and equal risk, and for our joint and equal benefit, but that the alteration, letting, resale, or other disposition of the said premises, and all negotiations relating thereto should

\* 29 be made and carried \* on by, and in the name of, the said Read alone, and that my name should not appear or be made use of in the matter." This agreement was not reduced into writing till the 10th March. It was then signed, but dated back as of the 8th February. Scott deposed, that on the 8th February he had a conversation with the appellant on the subject of premises for the bank; that it arose from Tyrrell mentioning the Hall of Commerce, and stating that Read had written to him or seen him on the subject, and Scott understood from the appellant that Read was the proprietor of the Hall of Commerce, or had the disposal of it; the appellant said it was a very excellent site for the bank, and Scott thereto assented. On the 9th February, Read, in answer to a supposed letter from Tyrrell (for in fact none had been written), wrote a letter to him, saying, "I beg to inform you, that the price asked for the Hall of Commerce, with the freehold upon which it stands, is 110,000*l.*, an amount, if I am credibly informed, refused by the original proprietor, who asked and adhered to his price of 120,000*l.*" The letter then went on to give reasons why, considering what had been paid for adjoining property, this was not to be considered an exorbitant price. On the same 9th February, Tyrrell saw Scott, and mentioned Read's letter, and (for their evidence differed as to this point) either expressed his own opinion, that the price asked was unreasonable, or concurred with Scott's opinion to that effect. Scott thought that all that was needful to be done was to secure the refusal for a limited period, and Tyrrell accordingly wrote to Read for that purpose, and received an answer, that the matter should be considered open "till the 20th instant inclu

sive." On the 13th February, at a meeting of the promoters, Scott was formally appointed secretary, and Tyrrell, Paine, and Layton were formally appointed solicitors to the company. On the 13th March, sufficient \*subscriptions for shares hav- \* 30 ing come in, the banking company was considered to be completely formed. Towards the latter end of March, Scott consulted, in a friendly, and not professional form, Mr. Bunning (the City architect) on the subject of these premises, and Mr. Bunning, estimating the real value of the property at about 70,000*l.*, expressed his opinion, that the bank ought not to lose the opportunity of securing them at 80,000*l.* Scott made inquiries, and reported the results to the directors, who, on the 31st March, resolved "that the solicitors be instructed to make inquiries, and to obtain the fullest particulars relative to the said property." On the 5th April there was laid before the directors a letter from Read, offering "the Hall of Commerce in Threadneedle Street for 90,000*l.*"; and the solicitors were then ordered to enter into negotiations with authority to offer any sum not exceeding 60,000*l.* On the 12th April this offer was made and declined. On 13th April an offer was made from Read at 71,000*l.*, and declined by the directors; but the "solicitors were authorised to intimate that if an offer of the building is made at once for 65,000*l.* it will be accepted." At a meeting, on the 24th April, an offer, at this amount, was made, and the solicitors were instructed to accept it. The purchase thus made did not include the whole of the property. Of this gross sum, 500*l.* were paid in satisfaction of some claim by other parties; 48,410*l.* 4*s.* 2*d.* were paid to Mrs. Campbell, and the remainder finally paid over to Read. It was alleged, that the profit to the appellant Read on the sale to the respondents amounted to 6000*l.* each, and that the unsold property was, in addition, worth 8000*l.* Doubts were soon afterwards thrown on the right of Read alone to make this sale, and in December, 1855, and November, 1856, suits were instituted against him by some of his coadventurers seeking to \*have the benefit of what he had done. The first suit was \* 31 compromised. In February and April, 1857, Read and the appellant were examined in the latter of these suits. In consequence of what transpired on these examinations, the respondents filed their bill against the appellant and Read and the other necessary parties, praying that the appellant and Read might account to the respondents for the profits made by them, respectively, upon

the sale of the premises, and that the appellant and Read and all necessary parties might convey such parts of the premises as had not been conveyed to the respondents (the respondents being willing to give the appellant and Read credit for the purchase money paid to Mrs. Campbell and for all sums paid in buying up the claims of the coadventurers), and for general relief. The appellant and Read having put in their answers, and evidence having been taken, the Master of the Rolls, on the 30th June, 1859, ordered, that, as to Read, the bill should be dismissed, but without costs; and it was declared that Tyrrell, the now appellant, was a trustee for the respondents of all the interest acquired by him in the hereditaments, and that the respondents were entitled to the clear profits derived from the sale of the same; and accounts were directed, and it was ordered, that the appellant should convey to the respondents all his share and interest in all the hereditaments purchased from Mrs. Campbell, and remaining unsold.<sup>1</sup> This was the decree appealed against.

*The Solicitor-General (Sir. R. Palmer) and Mr. Rolt (Mr. Speed* was with them), for the appellant. — The bill asked relief which it is not in the power of the Court to grant, namely,  
 \* 32 that the appellant and Read \* may account to the respondents, and pay them not only the profit realized on the sale of the Hall of Commerce, of which the respondents were the purchasers, but also the value of such portions of the purchased property as still remained unsold. The Master of the Rolls dismissed the bill as to Read, who, he said, was a stranger; but granted the prayer as to the appellant. This decree cannot be supported; first, the respondents never had any interest, and have not now any right to claim an interest in the appellants' original purchase from Read of one half the property; and secondly, as to the Hall of Commerce itself, they may have a right to rescind the contract, and to have a return of the purchase money, with interest, *Driscoll v. Bromley*,<sup>2</sup> but no more. They cannot keep the premises purchased under a contract, and yet refuse to perform the terms of that contract, nor, if they call on the appellant to account to them as their solicitor and agent, can they make him do so, except so far as relates to the property sold: *The Great Lux-*

<sup>1</sup> 27 Beav. 273.<sup>2</sup> 1 Jur. O. S. 238, 306.

*embourg Railway Company v. Magnay*.<sup>1</sup> At the time the letter was written, with the offer of sale for 110,000*l.*, the appellant had not received any authority to treat for the company, nor did he receive any authority to do so till the end of March, 1855. There was nothing before that time which could prevent him from buying the property. An agency cannot be established retrospectively to affect his rights. [THE LORD CHANCELLOR (LORD WESTBURY). — But was he not during all that time the adviser of the company; had he not a higher duty than that of agent?] He had not; his duty up to that time had been merely to get shareholders to join the company. There was no Board of Directors; there had not arisen any necessity to purchase \* premises for occupation. [THE LORD CHANCELLOR. — Were \* 33 not the 6000*l.* obtained by him through concealing the fact that he, the solicitor of the respondents, was selling to them his share of a certain property? Can any obligation of agent be higher than that of solicitor?] Still, that will not give the respondents more than a right to rescind the contract. And, at all events, supposing that accounts may be directed, they must be confined to the Hall of Commerce, which was the only subject of dealing and purchase by the respondents, and cannot extend in any way to affect the other property.

There are three classes of cases applicable to a matter of this kind. First, when the trustee or agent (it is not here meant to insist on any distinction between them) openly or secretly prevents the *cestui que trust* or principal from purchasing property, and purchases it for himself for the purpose of gaining a profit for himself, as in *Fox v. Mackreth*;<sup>2</sup> there the *cestui que trust* may require the other party to be declared a trustee for him. The second class is where the trustee, agent, or solicitor, selling his own property to the *cestui que trust*, principal, or client, conceals the fact that it is his own. There the contract may be set aside, and that is the class of cases within which the present falls, and no other decree can be made against the solicitor. The last class is, where the agent is expressly employed to buy or sell, and he does so at a certain price, and then misrepresents to his client what has been done, and by buying at one price and selling at another, gains for himself a profit on the transaction; there the client has a right to

<sup>1</sup> 25 Beav. 586.

<sup>2</sup> 2 Brown, Ch. 400, 2 Cox, 320, 4 Brown, P. C. 258.

say, "The transaction is mine, and I am entitled to all the profit of it." Nothing of that sort has occurred here. The test

\* 34 \* by which to try the class to which this case must be referred, is this : Had the appellant become the owner of the

property before he was in any way authorised by the company to negotiate for the purchase of it? if he had, there is no pretence to treat him as a trustee for the company. He had a right to purchase a share of this property, and he had a right to sell it to the company. No rule of law prevents that. *Cane v. Allen*.<sup>1</sup> All that is required is, that he shall not take an unfair advantage of his situation. Then again, if not a purchaser of the property, had he agreed with Read to procure this purchase, and to share the profits of the transaction, and had he entered into such agreement before he received from the company instructions to purchase? [LORD CRANWORTH. — Or was that a matter of subsequent recognition?]

No ; it is not admitted that that would be sufficient. [LORD CRANWORTH. — Suppose that there was not any binding agreement, but that Read said to the appellant, "If they will buy, you shall have a large benefit from the business."] That would not be sufficient to make him liable to be treated as a trustee for the company. There must be a binding agreement. Suppose a solicitor knew that there was a farm close adjoining to the estate of one of his clients, and also knew that it was very likely the client would, if he could, buy that farm ; and suppose that the solicitor before any instruction given by the client, bought it for himself, and had it conveyed not to himself but to trustees for him. Suppose that the client afterwards instructed the solicitor to buy this farm for him, and the solicitor negotiated the purchase as if the farm belonged to the trustees, and after the transaction was completed,

the client discovered that the farm was in truth the property \* 35 \* of the solicitor, the client might set aside that contract, but could not, because the solicitor had bought for his own profit on a mere contingency of a moral kind, insist on keeping the farm, and yet claim to keep it not at the price agreed on, but at that at which the solicitor had bought it. Or, suppose the owner of the property said to the solicitor, There is a farm I have got, and I will sell you half of it at a certain price, and at some future day you will get it purchased by your clients ; and things afterwards happened as was expected. The Court would treat

<sup>1</sup> 2 Dow, 289.

that as equitable fraud, and would make the solicitor refund the money and pay the expenses, but there the equitable relief would stop. Go a step further; suppose the owner of the property says to the solicitor, I will give you 5000*l.* if you will get your client to purchase the estate, and the solicitor does so; that would be earning a bribe; but, when the facts were discovered, though the client might repudiate the purchase, he could not keep the property and yet insist on being paid the sum which the solicitor was to receive. Where what was done was so done after instructions to the solicitor or agent, the client could get no relief beyond that of rescinding the purchase. But where the agent, acting under direct instructions previously given, took advantage of his employment to obtain a benefit for himself, he was held, as to that benefit, a trustee for his principals. *Fox v. Mackreth*; <sup>1</sup> *Fawcett v. Whitehouse*; <sup>2</sup> *Driscoll v. Bromley*; <sup>3</sup> *Lees v. Nuttall*; <sup>4</sup> and *The Midland Railway Company v. Hudson*,<sup>5</sup> illustrate this distinction. [THE \*LORD CHANCELLOR mentioned *Hichens v. Congreve*.<sup>6</sup>] There the parties negotiating had been expressly employed for that purpose, and were therefore held to be trustees for their principals. There had been no such express employment here till after the time when the appellant had become owner of the property. The principle of this distinction was explained by the Master of the Rolls in *The Great Luxembourg Railway Company v. Magnay*; <sup>7</sup> it had long ago been established in *Massey v. Davies*,<sup>8</sup> where the clerk of a company who was a secret partner in a firm that sold goods to the company, was held bound to account for his share of the profits thereby made, but that was expressly because at the time he made the purchases he was avowedly and expressly acting as agent for the company for which they were made. And that was the real ground of the decision in *Bentley v. Craven*; <sup>9</sup> and *Beck v. Kantorowicz* <sup>10</sup> carries it no further.

Here there was in fact no such employment at the time the appellant entered into the arrangement with Read. There is no semblance of his having had authority to treat for the purchase of

<sup>1</sup> 2 Brown, Ch. 400, 2 Cox, 320, 4 Brown, P. C. 258.

<sup>2</sup> 1 Russ. & M. 132.

<sup>3</sup> 1 Jur. O. S. 238, 306.

<sup>4</sup> 1 Russ. & M. 53.

<sup>5</sup> Not reported on this point.

<sup>6</sup> 1 Russ. & M. 150, n.; 4 Russ. 562.

<sup>7</sup> 25 Beav. 586.

<sup>8</sup> 2 Ves. Jun. 317.

<sup>9</sup> 18 Beav. 75.

<sup>10</sup> 3 Kay & J. 230.

this property till the 31st March, and even then he was only ordered to make inquiries. It might be that the appellant and his firm accepted the office of solicitors to the company at an earlier period, but that did not involve any authority to purchase premises for the company. It required a distinct and express authority to enable him to do that.

THE LORD CHANCELLOR (at the conclusion of the argument for the appellant), said that the House would relieve the  
 \* 37 \* respondents' counsel from answering that part of the argument which related to the moneys received by the appellant for the premises included in the indenture of the 11th August, 1855, and the direction that he should pay over the profits derived from that transaction, but would leave them to maintain the other part of the decree, namely, that which declared the appellant to be also a trustee for the respondents of that part of the property contained in the agreement between Read and himself, which had not been sold to the respondents.

*Sir H. Cairns* and *Mr. Amphlett* (*Mr. E. Macnaghten* was with them), for the respondents. — In that respect the decree can be supported on two propositions; first, that an agent employed by a principal as a negotiator and adviser concerning the purchase of an estate, and who has accepted the employment, is bound to use his best exertions to enable his principal to purchase on the most favourable terms, and is not at liberty to obtain for himself the estate, or any interest therein, or any share from the profits to be made from its sale; and if he does, the principal is entitled to repudiate the transaction altogether, or to adopt it, and take advantage of what has been done, *Bentley v. Craven*,<sup>1</sup> or may require a surrender of the interest or of the share of the profits, *Beck v. Kantorowicz*.<sup>2</sup> As to this proposition, it makes no difference if the negotiator and adviser is not the plenipotentiary to complete the purchase, but the rule applies if he is merely the medium of communication and the adviser of the terms proposed. The second proposition is this: The case is stronger and the equity higher when the interest is acquired, and a premium of any  
 \* 38 kind received \* by the negotiator and adviser in consideration of his power to induce his principal to conclude a bar-

<sup>1</sup> 18 Beav. 75.<sup>2</sup> 3 Kay & J. 230.

gain for the estate or any part of it. In that case he must surrender to the principal all the interest so acquired, or the premium so received by him; and it does not make any difference whether the corrupt arrangement is made in the expectation and confidence that he would obtain and exercise this power, or that he actually possessed the power when making that arrangement. Nothing can be more just than the application of these rules to the present case, for the respondents merely ask to have the premises at the value at which it is clear that Read would have parted from them to anybody on the 10th March. The facts show that here the appellant was not the owner of the property at the time he received authority on behalf of the respondents to treat for its purchase, and that he became interested in it because he knew that it was likely to be bought by them, and with the view to influence them in favour of making the purchase. If so, all the interest he then acquired, was acquired in trust for the respondents.

It is clear that the only motive of Read in giving an interest to the appellant arose from the appellant's connection with the bank as its solicitor. *Fawcett v. Whitehouse*,<sup>1</sup> is therefore directly in point for the respondents, and they are entitled to all the profits made by the transaction. *Taylor v. Salmon*<sup>2</sup> shows that whether he is the actual proprietor of the estate or not at the moment he enters into the negotiation, is not material with reference to the application of the principle that a solicitor or agent cannot make his employment the means of benefiting himself at the expense of his principal. \* Here the appellant was acting for the \*39 respondents in respect of the whole of the property, and therefore his liability to be treated as a trustee must extend over the whole.

*The Solicitor-General*, in reply. — The agency extended only to the property actually purchased by the company.

February 27.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, the decision which I shall advise your Lordships to pronounce in this case rests, in my opinion, on very clear principles and rules of conduct, of which it would be in the highest degree mischievous to impair the force or weaken the application. In my view of the

<sup>1</sup> 1 Russ. & M. 132.

<sup>2</sup> 4 Mylne & C. 134.



case, it is only necessary to ascertain that, at the time when the appellant agreed to take from Mr. Read one half of his purchase, he, the appellant, was acting in the capacity of solicitor to the respondents, and that he had advised, or intended to advise, his clients to purchase that part of the property which was ultimately bought by his clients. It is, I think, immaterial whether a solicitor had, before his own contract, advised the client to buy, and the client had agreed to act under such advice, or whether the solicitor intended only to give the client such recommendation, if, in the result, we find the client buying the property whilst acting under the advice of the solicitor. The consequence is, I think, the same. The principle is that the solicitor shall not be permitted to make a gain for himself at the expense of his client. The client is entitled to the full benefit of the best exertions of the solicitor. The relation of solicitor and client involves, of course, the relation of principal and agent. The duties of the first \*40 relation include all those of the second and \*something more ; and I prefer, therefore, to rest my opinion in this case on the obligations of a solicitor to his client, and on the conduct of the appellant being a violation of the duties and confidence which are incident to that relation.

It is clear that the relation of solicitor and client must be considered as subsisting at the time of the first step that was taken by the appellant in the acquisition of the property in question. It is true that if the 7th of February, 1855, be taken as the date of the first step, the company was not then in existence ; it was still unborn ; but it was conceived, and was in the process of formation ; and it had been arranged between the promoters, of whom the appellant was one, that if the company should be formed the appellant's firm should be the solicitors of that company ; and, accordingly, as soon as it was formed the appellant claimed to have acted as its solicitor from the middle of the month of February, 1855 ; and he was paid for acting in that character out of the moneys of the company. If we take the time when the first legal contract between Read and the appellant was made, namely, the 9th or 10th of March, 1855, the company had then been fully formed, and the appellant's firm acted as its confidential solicitors, and the company's want of a building like the Hall of Commerce had been fully ascertained ; but I take the earlier time in February as the most favourable to the case of the appellant.

Some difference in the evidence exists as to the actual day of the agreement between the appellant and Mr. Read ; but I think this difference is altogether immaterial, because my opinion is based upon these palpable conclusions which are derived from the admitted facts of the case, and which are furnished by the intrinsic evidence of the transaction.

In the beginning of February, Read and some other persons were the purchasers of the property in question, together with some adjoining premises. On the 5th or 6th of February (the day is immaterial) there was a meeting between Read and the appellant. It is clear, that the formation of the company and the eligibility of the Hall of Commerce for the establishment of that company, were subjects discussed between Read and the appellant. From what took place between them, it is clear that Read immediately concluded a contract with his co-purchasers for the acquisition of their interests, and it is also clear that Read agreed to give to the appellant one half of the entire purchase which he had thus gathered into his own hands. \*41

There was no consideration given by the appellant to Read for that beneficial purchase. The appellant distinctly admits, that he believed at the time that the property in question was worth a very much larger sum of money than that which was to be paid for it under Read's contract. The true consideration between Read and the appellant is to be plainly collected from that letter which it is admitted was written by Read in collusion and in concert with the appellant, and the very form of which was agreed upon between them.

That letter is dated on the 9th of February, 1855 ; and without thinking it necessary to read it at length to your Lordships, I must remind your Lordships of the important circumstance that the letter commences with that which it is admitted had no reality, namely, it professes to be an answer to an application by the appellant Tyrrell to Read, for the purpose of purchasing the Hall of Commerce for the use of the company. The appellant must be concluded by that which he has deliberately caused to \*be represented. Your Lordships, therefore, must hold \*42 that the appellant had placed himself in the position of solicitor for this intended company, applying to Read as the ostensible owner, for the purpose of buying these premises on behalf of the company. The language of the letter thus written by Read,

in pursuance of this mutual concert, begins in the following way :  
 "In reply to your favour of this date, I beg to inform you that the price asked for the Hall of Commerce is" such and such a sum.

The correspondence that followed equally proceeded upon the same fictitious basis, namely, the fiction of Read being the actual owner of the entire property, and of Tyrrell being, which in reality he was or must be taken to have been, the agent of the intended company, for the purpose of entering into the contract for the purchase of these premises.

Nothing was done until some time had elapsed, but in the intervening period, the real objects of these parties, independently of what has been sworn in evidence in the matter, to which I do not advert, is plainly to be collected from that fact which I take to be established,—that the property was carefully kept by Read and Tyrrell until the company was in a position to feel the necessity of obtaining such premises, and had been so far formed as to be enabled to proceed to the consideration of the purchase.

Accordingly we find a resolution of the company, which resolution I must take to have been made under the advice of the appellant Tyrrell himself, and which is dated on the 19th of March, that the company should proceed to treat for the premises, and a resolution of the 5th of April commits the conduct of  
 \*43 that treaty to the \*solicitors of the company, that is, to the firm of which Tyrrell, the appellant, was the principal and leading member.

What ultimately followed was this: that Tyrrell's, the appellant's, interest in this property being most carefully concealed from his clients, whose interest it was to be aware of that fact, and whose right it was, by virtue of the relation between them and their solicitor, to know that fact, the respondents, under the advice of this firm, proceeded ultimately to enter into a contract for the purchase of the material part of this property, which contract was concluded on the 5th of May, 1855, and by which they were to give for the principal part of the premises, the sum of 64,500*l*.

That sum alone, independently of the value of the unsold portion of the premises, very considerably exceeded the amount to be paid for the whole of the property by Read. One half of that sum, therefore, which was, secretly, purchase money to be paid to Tyrrell, would very considerably exceed the amount that Tyrrell

had to pay to Read by virtue of the engagement between them of the 8th of February.

I ought to have mentioned that when it was considered reasonably certain that the respondents would become the purchasers of these premises, and on or about the 9th or 10th of March, 1855, the agreement between Read and Tyrrell, which does not appear to have been previously committed to writing, assumed the shape of written articles of agreement. They were in reality signed by the contracting parties Read and Tyrrell on the 10th of March, but they were made to bear date on the 8th of February, as being the day when the real original contract, though a verbal contract only, had been made between Read and Tyrrell, and in pursuance of which \* contract that letter of the 9th of February had \* 44 been written.

Upon these admitted facts, independently of any evidence except simply the evidence that places the relation of Tyrrell to the bank beyond all possibility of question, and which is not attempted to be contradicted, it is abundantly clear that two of the most important principles to be ever most sedulously preserved in considering the cases in which there is any breach of the high duties that are incident to the relation of solicitor and client, have plainly been violated by Tyrrell. It was his bounden duty to tell his clients what he had done. It was his bounden duty to give his clients the benefit of those exertions which he had employed for his own advantage. He forgot the first duty of a solicitor in the concealment and falsehood which were practised.

My Lords, there is no relation known to society, of the duties of which it is more incumbent upon a Court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client; and I earnestly hope that this case will be one of the many which vindicate that rule of duty which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled.

Therefore, my Lords, that in respect of the subject matter of the transaction carried on in this relation, Tyrrell the appellant must be converted into a trustee for the respondents, there can be no possibility of doubt. But the argument on the part of the respon-

dents, and the decree of the Master of the Rolls, have been,  
 . \* 45 in one \* particular, carried further, and have involved the conclusion not only that Tyrrell shall be a trustee of that particular subject of the relation between him and his clients, namely, the property that he actually bought and conveyed to his clients, but that the principle shall be extended further, to give the clients the benefit of property and the benefit of a contract with which the clients had no concern. Now, I must submit to your Lordships that in the particular mode in which that is effected by the decree of the Master of the Rolls, there has been an error, a departure from the true principles of equity. The foundation of the decree is the relation of solicitor and client, but that is constituted retrospectively by considering, first, what it was that the client took, and then, with respect to the property that was the subject of the transaction, the duties of the relation of trust and the obligation to account necessarily arise.

You cannot, my Lords, I think, with propriety do more than declare Tyrrell to be a trustee for his clients of that particular property included in the contract. He shall make no gain from his clients in respect of that property, but beyond that, I humbly submit to your Lordships that it would be impossible safely to carry the principle. But the object that the Master of the Rolls had in view, I think, is to be obtained by another mode of proceeding, which in reality is necessarily involved in the view of the case which I have already submitted to your Lordships.

My Lords, Tyrrell must receive from his clients, in his character of vendor to his clients, only that sum of money which, as between him and Read, Tyrrell must be taken to have paid for the property conveyed to his clients, but that sum of money must be ascertained in the following way: By deducting from it the value of the unsold property included in the contract between Read and Tyrrell  
 \* 46 \* but not included in the contract of sale to the clients, the respondents. For the limit of the agency of Tyrrell, the extent of the obligation of Tyrrell, the bonds of the relation of solicitor and client between Tyrrell and the bank, are all to be ascertained by the extent of the property sold by Tyrrell to the bank. As to that property, the obligation arises; with regard to other property there is no privity, nor any obligation. But Tyrrell, retaining the other property, must account for the value of that property, and the value of the property so retained by Tyrrell

must be deducted from the purchase money that Tyrrell had to pay to Read, and must therefore be deducted from the purchase money which Tyrrell received from his clients, the banking company.

I am very desirous therefore, my Lords, of substituting for the language of the Master of the Rolls, some expressions which I trust, subject to your Lordships' correction, will more clearly and usefully define the exact principle upon which, as I submit to your Lordships, the decree ought to be founded.

But whilst I propose that the decree shall be thus corrected in form and expression, I think that mode of correction necessarily gives rise to a very material addition to be made to the decree, and without which the measure of justice given to the respondents would be insufficient, and the lesson read by the decree itself would be imperfect. That sum of money which constitutes the difference between what Tyrrell would pay after making the deduction of the value of the unsold property, and what Tyrrell would have to receive as a co-vendor to his clients, constitutes the debt of Tyrrell to the bank. It is a sum of money that was obtained by a breach of duty: it is a sum of money that must be restored to the clients, with full compensation for its having been originally \* wrongly received and having been so long withheld; and \* 47 therefore I propose to your Lordships to accompany the repayment of the principal by the repayment of the full amount of interest which is given in cases of breach of duty and violation of trust, namely, five per cent.

My Lords, I am more particularly desirous of altering the language of the decree, because it is necessary for your Lordships to put it upon a basis that shall be consistent with two important considerations: one is, that this bill was, as against Read, dismissed by the Master of the Rolls. We cannot deal with that part of the original decree, for it is not the subject of any appeal. I may, however, pass upon it this observation, that, as Read was a party implicated in the violation of trust, committed by Tyrrell, I should have been better pleased if Read had been retained in the character of a surety for the fulfilment of Tyrrell's obligation. But with that your Lordships, judicially, can have nothing to do.

The other circumstance which it is necessary to recollect in the language of your decree is, that you must put it upon a ground consistent with that fact, that you do not undo the transaction, but you leave the clients, the purchasers, the full benefit of the

contract of purchase by the retention of the property included in it.

I shall, therefore, beg your Lordships' particular attention to the language in which I propose to word the decree, in the hope that it will receive your approbation. Declare that, having regard to the relation of solicitor and client which subsisted between the appellant and the respondents at the time of the contract of purchase made by the appellant with Read, and also to the date of the agreement of the 5th of May, 1855, in the pleadings mentioned

(it will be recollected that that was the date of the contract of purchase by the bank), and regard \* 48 being also had to the circumstance, that the appellant suppressed and withheld from the knowledge of his clients, the respondents, the fact that he was joint owner with Read of the property comprised in the last-mentioned agreement, the respondents are entitled, as against the appellant, to the benefit of the contract made by the appellant with Read, so far as relates to the premises sold and conveyed to the respondents, and, therefore, take an account of the moneys paid by Tyrrell in respect of the agreement dated the 8th of February, 1855, and of the moneys properly expended by Tyrrell in respect of the said hereditaments, including all costs, charges, and expenses properly incurred by him, and all payments properly made by him in relation to the premises, and ascertain the value of the unsold property comprised in the contract between Read and Tyrrell, but not sold to the company, as the same property stood at the date of the contract of the 5th of May, 1855, and deduct one half of such last-mentioned value, when so found, from the sum total of the moneys found to have been paid and expended by Tyrrell, as aforesaid, and declare, that the difference between the balance thus obtained, and the sum of £2,250*l.*, being one moiety of the purchase money paid by the respondents under the agreement of the 5th of May, 1855, is a debt due from the appellant, Tyrrell, to the respondents, and became and was such debt on the 11th of August, the day of completion of the contract, and ought to be now paid, together with interest thereon at five per cent., computed from the said 11th of August, 1855, up to the time of the payment unto the respondents; and decree the same accordingly.

The nature of the alteration which is thus made in the language of the decree, and the other alterations that I have submitted for

your Lordships' consideration, forbid, I think, our going on further to make the appellant pay \* the costs of this appeal. \* 49 I should, therefore, advise your Lordships to make no order with regard to the costs of the appeal, but to substitute declarations and decree I have proposed for the declarations and decree pronounced at the Rolls, beginning such substitution from the end of the dismissal of the bill against Edward Rudston Read, but leaving, of course, untouched that part of the decree which directed Mr. Tyrrell to pay the costs of the respondents, the plaintiffs in the Court below.

LORD CRANWORTH. — My Lords, I do not feel it necessary to add much to the observations which have been addressed to your Lordships by my noble and learned friend on the Woolsack. He has most correctly stated the principles on which this and similar cases are to be decided; and I should, indeed, deeply regret if there could have been any thing in the decision of this case that could in the slightest degree lead the public to suppose that the practice and principles of the Court, which are so strict in holding agents in general, but particularly solicitors, to the most exact performance of their duties towards their employers and clients, were in the slightest degree to be infringed. I confess that, in the early part of the argument, I had thought that possibly we might arrive at the conclusion that the decree was, not only in substance, but also in form, perfectly correct. But I quite admit, that in the progress of the argument I became satisfied (although, probably, the alteration may not, in the result, make any material difference in the practical bearing of the decree upon the parties), that it would be improper to leave it in that form in which it would not be a safe precedent for similar cases hereafter.

My Lords, there has appeared to me from the beginning, \* to be one short ground upon which this case might rest. \* 50 Throughout the whole of the dealing and the negotiations for this purchase, Tyrrell represented to his clients, the company, that Read was the sole owner of this property. To that representation the respondents are entitled to hold him bound; and, that being so, the only question is, what was the sum of money which actually came from their pockets or coffers to Read. For all that passed through Tyrrell, in its progress from the respondents to Read, but which never came to Read's hands, but was retained by



Tyrrell, was so much money, which he (I must use the word) fraudulently abstracted from his clients.

Now, the mode of arriving at that, I think, has been most correctly pointed out in the decree proposed by my noble and learned friend. The result will be, that, although Tyrrell will (not as by the decree at the Rolls) be entitled to retain half of the unsold property, yet, in estimating the proportion of what he has paid to Read, which is to be attributed to the Hall of Commerce (the part actually purchased by the bank), the value of that which has been sold must be deducted.

My Lords, I will not add a single observation, except to say, that if it had been necessary to go into the facts of this case in detail, I should have had no sort of hesitation, if I had been a jurymen, in coming to the conclusion, that, from the very beginning to the end, up to the time of the completion of this contract, it was perfectly understood between Tyrrell and Read, that Read was to let Tyrrell have half the benefit of the contract, which they all thought must turn out to be extremely beneficial ; and that, in consideration of that, Tyrrell was to recommend his clients to become the purchasers.

\* 51     \* LORD CHELMSFORD. — My Lords, I agree with my two noble and learned friends in the conclusion at which they have arrived. With respect to that part of the decree of the Master of the Rolls which relates to a portion of the property sold to the Bank of London, if it were not affirmed, the House would make a serious inroad upon those principles established in Courts of equity by which persons clothed with a fiduciary character are restrained within the bounds of honesty and fair dealing.

What was the relation in which Mr. Tyrrell stood to the respondents from its origin, and whether he purchased the property in question under circumstances which would make him their agent in the transaction, are questions entirely of fact, but upon which, I think, no doubt can reasonably be entertained. On his behalf, it is contended that, admitting that he and his partners were the solicitors to the company, yet that he made the purchase of the property on his own account, although probably anticipating that he might sell it afterwards with advantage to the company, and that, therefore, all that they can be entitled to do under the circumstances is to rescind the contract, but that they cannot keep

the property and compel Tyrrell to refund the profits he had obtained. But, I think, it clearly appears, from the nature of the dealings between Tyrrell and Read, and afterwards between Read and the company, that Tyrrell's object from the first was to obtain an interest in the property, that it might afterwards be transferred to the company in a manner which would enable him secretly to secure to himself a considerable pecuniary benefit out of the transaction.

That Tyrrell, and perhaps his partner, Mr. Paine, were \* original promoters of the Bank of London appears from \* 52 the minutes of the first meeting on the 15th January, 1855, which is described as a meeting of the promoters of the scheme for establishing a new joint stock bank. At this meeting the only persons present were Tyrrell, Paine, and Mr. Scott; and, upon this occasion, Tyrrell and his partner expressed their willingness to undertake the office of solicitors to the bank. From that time, therefore, Tyrrell stood in a relation to the present and future members of the company which precluded him from deriving any private benefit to himself from any contracts or negotiations entered into by him on their behalf. Whether, if Tyrrell, without previous authority from the respondents to procure premises for them, had joined Read in his speculation, knowing that the property was likely to be eligible for the purposes of the respondents, but had not afterwards attempted to have the property transferred to them, they could have been entitled to lay claim to the benefit of his purchase, is a question which it is unnecessary for us to consider. In such a supposed case there would have been wanting the circumstances, which exist in the present, to warrant the presumption that he acted as the agent of the respondents in obtaining the property. Again, if Tyrrell, without authority from them, but knowing the property to be an eligible one for them, and with the expectation that they would be desirous of purchasing it, had acquired it for himself, and, concealing his own interest, had sold it to them through a stranger, the only equitable relief to which they would have been entitled upon discovering the true circumstances, would have been to set aside the whole transaction. They could not have claimed to retain the property (which, upon the hypothesis, had belonged \* to Tyrrell, and not to them), \* 53 and also to have had the profit which he had gained, however improperly acquired.

But this case goes far beyond such a supposed transaction. Here it is evident that the whole object and design of Tyrrell was to obtain an interest in property which was about to be, and was immediately afterwards, offered to his clients, the respondents, and that the acquisition of this interest was merely the first step in a scheme for securing to himself an improper advantage from dealings with them, which his confidential relation of solicitor strictly prohibited.

That this was the object with which Tyrrell entered into what he calls "the joint speculation" with Read is apparent from the evidence. And that Read had in view a sale to the respondents, and for the promotion of this end was willing to enlist the influence of Tyrrell, their solicitor, by permitting him to share in the benefit of his dealings with the property, is no unfair presumption; as it is difficult to account in any other manner for the admission of Tyrrell to a participation in Read's expected profit out of a speculation, of the value of which he appears to have formed a highly exaggerated estimate. And I agree in the passing observation which has been made by my noble and learned friend on the Woolsack, and, with him, I should have been better satisfied if the bill had not been dismissed as to Read.

It was on the 5th or 6th of February that Read first communicated to Tyrrell the fact of his agreement for the purchase, by himself and others, of the property from Mrs. Campbell, and as appears from Tyrrell's answer to the bill, Read at that period "expressed a wish that the Hall of Commerce should be offered to the projected bank when formed." On the 7th of February, Read contracted \* to purchase the interests of his coadventurers, and on the 8th of February, Read and Tyrrell verbally agreed upon the terms on which they were to enter upon their "proposed joint speculation." This verbal agreement was of course not binding upon either of the parties, but that the arrangement was made with a view to the commencement of their operation against the company, is clear from what immediately followed. On the next day, the 9th of February, Read, at Tyrrell's office, wrote the letter of that date, representing the price of the property to be 110,000*l*. It was necessary, for the accomplishment of their object, that they should appear to stand in an independent position towards each other. This was to be effected by concealing the fact of Tyrrell being one of the vendors, and by in-

ducing the belief that he was acting in the performance of his duty as solicitor for the respondents, for their interest and protection. Accordingly this letter, written by Read in Tyrrell's office, is so expressed as to make it appear to be an answer to an application by Tyrrell to be informed of the price of the Hall of Commerce, for it begins, "In reply to your favour of this date," it being admitted that no prior letter was written by Tyrrell to which this could be an answer. That this was the commencement of their operations against the company, may be inferred from the fact that this letter was shown on the same day to Mr. Scott by Tyrrell, and it could have been prepared with no other view. The contrivance of the parties appears to have been to tempt the company into the purchase of the property, by first preparing them for having to pay a large price for it, and afterwards by lowering the demand to induce them to close with an amount which, by comparison with the first offer, they would be likely to consider as securing them a very good bargain. With this view Tyrrell communicated \* to Mr. Scott the letter of the 9th of February, \* 55 with the slight remark that he "considered the price asked was unreasonable." Now it is impossible to believe that Tyrrell could at that time have been ignorant of the fact that a few days before, viz. on the 3d of February, Read and his coadventurers had authorised, through Mr. Vigers, the offer of a sale of the whole property for 55,000*l*.

No active steps appear to have been subsequently taken to induce the company to purchase until after Tyrrell had secured an interest in the property, by the agreement which was signed by him and Read on the 9th or 10th of March, though dated back to the 8th of February, the day when the terms of the joint speculation were arranged; after the completion of that agreement, the operations of the parties were speedily resumed, though there is no distinct trace of them in the evidence, and they can only be collected from an item in the solicitor's bill of costs under the date of the 19th March, where a charge is made for "attendances upon Mr. Read on his proposing to us the Hall of Commerce for the bank, discussing the terms, and correspondence with that gentleman, and attending the secretary thereon."

The same mode of action as before seems to have been adopted upon the renewal of the negotiations. An exalted idea of the price of the property is again presented to the company, apparent-

ly with the view of disposing them the more readily to close with an offer of lower terms. Accordingly Tyrrell sent to Mr. Scott a letter from Read, dated the 27th of March, 1855, stating that he had had an offer for the property equal to 90,000*l.*; Tyrrell says he did not know otherwise than by Read's statement, whether it was true or false that Read had had this offer. But it appears scarcely credible that, deeply interested as Tyrrell had become in the sale of the property, he should not have obtained full information respecting such an offer. At all events, it cannot be doubted that it was his duty, as solicitor, to ascertain the truth of the statement before he transmitted the letter to the company, without a word of remark as to the improbability of such an offer having been made.

This was, however, seemingly intended to pave the way for the next letter written by Read to Tyrrell on the 3d of April, 1855, stating, "that the negotiation for the sale of the property for 90,000*l.* had gone off, and offering it to Tyrrell's clients for that amount, provided the same be accepted within ten days." Again, it strikes me as most unaccountable, that if Tyrrell did not believe this offer to be a pure fiction, he should not have demanded an explanation from Read of all the particulars respecting it.

The letter of 3d April was also sent to the secretary, unaccompanied with a single word of comment upon the extravagant price of 90,000*l.*, but with an observation that the solicitors understood that Read had refused one offer which was not so high as the figure which the directors had been advised the property was worth to them, and they add, "we believe this information is correct." What is the advice to the directors particularly referred to in this letter does not distinctly appear, nor is it anywhere shown that Read had any other offer for the property than the alleged one of 90,000*l.*

I cannot help viewing this letter as designed to prevent the closing of the negotiations upon the assumption of the 90,000*l.* being a final offer by Read, and at the same time to act as a stimulus to the company to propose a lower, though still a considerable sum, for the property. This effect appears to have been produced, for on the 5th of April, 1855, a resolution of the Board of Directors was passed, giving the solicitors authority to offer the sum of 60,000*l.*, and after offers and counter offers had been made, the parties ultimately agreed upon the price of 65,000*l.*

I have gone so fully into the principal circumstances of the negotiations between the parties, for the purpose of justifying the view which I have taken, that Tyrrell, the solicitor of the respondents, bound by his relation to them to protect their interests, and to act fairly and conscientiously, on their behalf, had clandestinely contrived that the property should be so dealt with in its transmission to them, that he should derive a considerable benefit to himself out of their purchase. And if this is a correct view of his conduct, it would be contrary to those principles of equity which are so justly applied to a person standing in a fiduciary relation to another, if he were to be allowed to retain from those who trusted him, the benefit which he has thus derived from the abuse of their confidence.

All that has been already said, refers to that part of the decree which relates to the portion of the property sold to the company ; the other part, directing a conveyance of the unsold property to the company, requires a separate consideration. In order to decide the propriety of this part of the decree (as to which the Master of the Rolls himself felt considerable hesitation), it will be necessary to ascertain whether Tyrrell had authority to negotiate for premises for the company before the 10th of March, when he completed his agreement with Read, and if he had, whether that authority extended to the whole of the property, or only to that part of it which was afterwards purchased by the company.

Upon the first question, Mr. Scott, in his evidence, says, "Mr. Tyrrell was not, before the 5th of April, 1855, authorised \* to procure premises for the bank." But the \* 58 respondents contend that the negotiations which commenced on the 9th of February were merely suspended for a time, and that when they were resumed in the month of March they proceeded upon the original footing, and are therefore a mere continuation of what had previously taken place. The appellant says, that by the admission of the respondents themselves, the treaty in February had come to an end, for in their bill they say that the terms offered in the letter of the 9th of February were so unreasonable, that Mr. Scott declined to submit the same to the directors, and the offer dropped without answer." He therefore contends that the negotiations in March must be considered as original, and not a continuance of the former ones.

It seems to me that the decision of this question is far less

important than the determination of what is the particular property to which the authority extended. After carefully considering the subject, I have come to the conclusion that the property which was purchased by the company was the same which, in the letter of the 9th of February, under the name of the Hall of Commerce, was offered at the price of 110,000*l*.

The grounds of this opinion may be very shortly stated. Tyrrell, in his answer, says, that on 19th March, 1855, an intimation was given to Read, "that if he wanted to sell the Hall of Commerce he must lower the terms he had previously asked." This, of course, can only refer to the letter of the 9th February, no other offer having been made. Read, accordingly, sent a letter to Mr. Scott, offering the Hall of Commerce for 90,000*l*. This letter was laid before the board on the 5th April, 1855, and the solicitors were then instructed to enter into negotiations for the purchase of the Hall of Commerce, \* with authority to offer for the same any sum not exceeding 60,000*l*. ; and this ended in the purchase at 65,000*l*. Of course, if Tyrrell had been authorised to buy the whole of the property which belonged to Read, and had purchased it for himself, the company would have been entitled to the benefit of the entire purchase.

But the respondents contend, further, that, supposing the authority to Tyrrell was confined to that portion of the property which was afterwards conveyed to the company, yet the agency of Tyrrell, as to this part being established, the circumstances show that he received his share in the rest of the land as a bribe to induce him, contrary to his duty, to prevail on the company to become the purchasers of the part which they bought, and, therefore, that they are entitled to have the unsold part of the property conveyed to them. No authority has been adduced in support of such a proposition, and I do not think it can be maintained.

In order to simplify the question, let it be supposed that Tyrrell had acquired no interest in the property, but that Read had offered him 5000*l*. to induce the respondents to purchase, and that they had been persuaded by Tyrrell to buy at an excessive price. Of course, they might have rescinded the contract; but could they, in any manner, have obtained the 5000*l*. on the ground that it belonged to them? If, by reason of the agreement between Read and Tyrrell, the respondents had been prevailed upon to give too large a sum for the property, they might have maintained an

action upon the case against both the parties to the imposition upon them, and have recovered damages. Or, they might have sued their agent, Tyrrell, for the damage arising from his breach of duty; and they would probably have recovered an amount equal to the sum which he had improperly \*received, as a \*60 fair measure of the injury which they had sustained. But the 5000*l.* itself, as a specific demand, they could in no manner have recovered. The unsold part of the property, in the same manner, cannot be directly reached by any proceedings of the respondents. Their right to relief as to the property which they purchased arises either from their having given their agent authority to buy it for them, or from the sale to them raising an implied agency which entitles them to all the benefit of their agent's contract to the extent to which they have made it their own. But, in either view, their claim cannot be carried beyond the limits of the express or implied agency. The express authority (if any is established before the 10th of March) applies only to the Hall of Commerce, the implied agency arises upon the purchase by the respondents of the same premises, and entitles them to all the benefits which the agent has derived from his dealings with this portion of the property, but to nothing beyond it. I think the fair way of ascertaining the extent of that benefit is that which has been proposed by my two noble and learned friends. I agree also that Tyrrell ought to be charged with interest upon the sum which he will have to refund to the company at the rate of five per cent.

*The Solicitor-General* suggested that the part of the order which directed the accounts should be thus expressed, "including therein one moiety of the sum of 48,410*l.* 4*s.* 2*d.* paid to Louisa Campbell, on the 11th of August, 1855." Because that sum was paid directly by the respondents, and was not paid by the hand of Tyrrell.

THE LORD CHANCELLOR. — My Lords, I consider that the object proposed by the \*learned counsel at the bar will be \*61 attained by the words which I have suggested, namely, "moneys paid and expended by Tyrrell or by his order," because it has been most accurately stated that the moneys payable to Mrs. Campbell were paid direct by the respondents out of their purchase money. Unquestionably that payment must be treated as a



payment made by the order of Tyrrell, and accordingly, therefore, one moiety of that will be considered as included in the account to be taken. I think that the language that I have used, "moneys paid and expended by Tyrrell, or by his order," sufficiently meets the object.

The following order was afterwards entered on the Journals:—

That the decree of the Master of the Rolls, of the 30th of June, 1859, be varied, by omitting the words, "that the defendant, Tyrrell, is a trustee for the plaintiffs of all the interest acquired him in the hereditaments comprised in the agreement of 20th September, 1854, made between Mrs. Campbell, Read, and others, and that the plaintiffs are entitled to the clear profits derived by Tyrrell from the sale to them of the hereditaments described in the pleadings as the Hall of Commerce, and conveyed to the plaintiffs by indenture dated 11th August, 1855: and it is ordered that an account be taken of all moneys received by Tyrrell, or by any other person by his order, or for his use, in respect of the hereditaments comprised in the said agreement of the 20th September, 1854; and that an account be taken of all moneys expended by Tyrrell in respect of the same hereditaments, including costs, &c.: and it is ordered that Tyrrell do convey to the plaintiffs all his share in all

and every the hereditaments comprised in the said agreement \* 62 of the 20th September, \* 1854," &c., and by substituting the words following: "That having regard to the relation of solicitor and client which subsisted between the defendant Timothy Tyrrell and the plaintiffs the Bank of London, at the time of the contract of purchase made by the defendant Timothy Tyrrell with the defendant Edward Rudston Read, and also to the date of the agreement of the 5th of May, 1855" (the date of the formal agreement for the purchase), "in the pleadings mentioned, and regard being also had to the circumstance that the defendant Timothy Tyrrell suppressed and withheld from the knowledge of his clients, the Bank of London, the fact that he was joint owner with the defendant Edward Rudston Read of the property comprised in the last-mentioned agreement, the Bank of London are entitled, as against the defendant Timothy Tyrrell, to the benefit of the contract made by the defendant Timothy Tyrrell with the defendant Edward Rudston Read, of the 8th of February, 1855, so far as it

relates to the premises sold and conveyed to the Bank of London ; and it is ordered, that an account be taken of the moneys paid by the defendant Timothy Tyrrell, or by his order, in respect of the said hereditaments, including all costs, charges, and expenses properly incurred by him, and all payments properly made by him in relation to the premises ; and that the value be ascertained of the unsold property comprised in the said contract between the defendant Edward Rudston Read and the defendant Timothy Tyrrell, but not sold to the plaintiffs the Bank of London, as the same property stood at the date of the agreement of the 5th of May, 1855 ; and it is ordered that one half of such \* last-mentioned value, when so found, be de- \* 63 ducted from the sum total of the moneys found to have been paid and expended by the defendant Timothy Tyrrell, or by his order, as aforesaid ; and his Honour doth declare, that the difference between the balance thus obtained and the sum of 32,250*l.* being one moiety of the purchase money paid by the Bank of London under the agreement of the 5th of May, 1855, is a debt due from the defendant Timothy Tyrrell to the Bank of London, and became and was such debt on the 11th of August, 1855, the day of completion of the contract, and ought to be now paid to the plaintiffs the Bank of London, together with interest thereon at 5*l.* per centum per annum, computed from the said 11th of August, 1855, up to the time of the payment to the plaintiffs the Bank of London ; and his Honour doth decree the same accordingly." And it is further ordered, that the cause be remitted back to the Court of Chancery, to do therein as shall be just and consistent with this variation, direction, and judgment.

Lords' Journals, 27th February, 1862.

\* 64

\* TAAFFE v. CONMEE.

1862. March 13, 14; April 3.

LOUISA TAAFFE and others, *Appellants*.  
CATHERINE CONMEE, *Respondent*.

*Will.* "Survivor." *Cross Remainders*.

The benefit of survivorship may be given to those who have life interests as tenants in common.

The word "survivor" in gifts of personal estate may be taken as referring to the period of distribution. It is not equally settled that with regard to real estate it applies to the determination of the prior limitation.

When the word "survivor" is applied to a class of persons, and individuals of that class are named, its natural meaning is "the longest liver" of those who are named.

A. devised his estates in trust to the use of his nephew, D. F., and his issue male in strict settlement, "and for default of such issue male in D. F., to the use of my nieces Julia, Rose, and Bridget, and the survivor of them for the term of their natural lives, as tenants in common and not as joint tenants, without impeachment of waste, and from and after their decease to the use of their first and every other son and sons, and the heirs male of their respective bodies, successively in equal proportions, the elder of such sons of each of my said nieces and the heirs male of their bodies being always preferred, &c. and for default of such issue male, then to the daughters of the said Julia, Rose, and Bridget, and for default of such issue male or female to my own right heirs." He directed that no son of a niece should take any benefit under the will, unless on assuming his name. D. F. died without issue. Julia had a daughter; Rose and Bridget had, each, a son; Julia and Rose died:—

*Held*, that the nieces took as tenants in common for life with cross remainders between them for life; that on the deaths of Julia and Rose, the "survivor," Bridget, took the whole for life; that the sons took a remainder, expectant on her death, as tenants in common in tail male, and that there was no estate in any daughter of a niece, until a total failure of issue male.

JOHN FERRALL, by a will dated 31st of March, 1823, devised all his estates in Ireland, of which he was seised in fee simple, or of any estate of freehold, or for any terms of years in possession  
\* 65 or reversion to trustees, to pay certain \* legacies, and subject thereto upon the trusts thereafter expressed. First, to the use of his nephew, Daniel Ferrall, then to trustees to preserve contingent remainders, then for the sons of Daniel Ferrall successively in tail male, and "For default of such issue male in the said

Daniel Ferrall, then to the use of my nieces, Julia Anne Ferrall otherwise Conmee, Rose Ferrall and Bridget Ferrall, and the survivor of them, for the term of their natural lives, as tenants in common, and not as joint tenants, without impeachment of waste, and from and after their decease to the use of their first and every other son and sons lawfully begotten, and the heirs male of their respective bodies successively, in equal proportions, the elder of such sons of each of my said nieces, and the heirs male of their bodies being always preferred, and to take before the younger and the heirs male of their bodies, and for default of such issue male, then to the daughters of the said Julia Anne Conmee, otherwise Ferrall, Rose Ferrall, and Bridget Ferrall, and for default of such issue male or female, to my own right heirs." No son of a niece was to take any benefit under his will, unless he assumed the name of Ferrall. The testator died in 1823, leaving his nephew Daniel Ferrall, and his three nieces him surviving. The nephew entered into possession, and died in 1853, without ever having been married. The three nieces were then all alive; Julia Anne was the wife of Conmee, and had a daughter, Catherine; Rose had married Patrick Nolan, and had a son, John Nolan; and Bridget had married Edmund Taaffe, and had a son, Henry Taaffe. The two sons, John Nolan and Henry Taaffe, assumed the name of Ferrall. There had been a fourth niece, not mentioned in the will of the testator, who had married a Mr. Irwin, and her son Daniel Henry Irwin \* and the three nieces Julia Anne, \*66 Rose, and Bridget were, on the death of Daniel Ferrall, the coheirs at law of the testator and of Daniel Ferrall. Mrs. Nolan died in 1853, not long after Daniel Ferrall.

In 1854, disputes having arisen about the property, the two nieces, Mrs. Conmee and Mrs. Taaffe, and John Nolan Ferrall, Henry Taaffe Ferrall, and Daniel Henry Irwin, entered into an arrangement by which they settled these disputes, and by which Mrs. Conmee gave up all her rights under the will for an annuity of 1250*l.* for her life; Mrs. Conmee's daughter, Catherine, the present respondent, was no party to that agreement.

In October, 1854, John Nolan Ferrall petitioned the Encumbered Estates Court for a partition and sale of the testator's estates. The petition was amended by adding Bridget Taaffe and Henry Taaffe Ferrall as co-petitioners. In February, 1855, the persons who had executed the articles of agreement became parties to a disentailing

deed which, though made the subject of discussion, became in the result immaterial. On the 19th of April, 1855, an order was made for a sale. Matthew Conmee, as committee of the lunatic Catherine Conmee, was allowed to enter an appearance for her and to file a claim on her part. On the 20th June, 1859, Judge Longfield made an order declaring that under the limitations in the will of John Ferrall, all the lands named in the order for sale devolved upon the three nieces of the said John Ferrall for the term of their natural lives, and varied the previous order for sale accordingly; and directed, among other things, that it should be without prejudice to any rights that Catherine Conmee might have upon the death of her mother.

\* 67 The appellants Bridget Taaffe, Henry T. Ferrall, and \* John Nolan Ferrall appealed against this order, which was, however, affirmed 22d of November, 1859.<sup>1</sup> An appeal to this House was lodged against this affirmance, but was not prosecuted.

The disputes about the claim of the lunatic still continuing, a special case was agreed on by the appellant and the committee of the respondent, for the purpose of obtaining the opinion of the Lord Chancellor on the construction of the will. In that case it was submitted on behalf of the respondent, that on the death of her mother Julia Anne (which happened in 1860), she became entitled in possession to an estate in fee simple in one third of all the fee simple estates devised by the testator, and to a similar estate in such estates as were held by him under leases for lives renewable for ever. On the other hand it was contended by the appellants that on the death of Julia Anne Conmee, the one third to which she was entitled devolved upon Mrs. Taaffe as the survivor of the three nieces for her life, and that Henry Taaffe Ferrall and John Nolan Ferrall became, on the death of Daniel Ferrall, entitled as to all the estates, to an estate in remainder expectant on the death of Mrs. Taaffe, with cross remainders between them in tail male.

The case was heard before Lord Chancellor Brady, who, in Hilary Term, 1861, made a decree declaring that the respondent, on the death of her mother, became entitled to an estate in fee simple in one third of the lands devised, and that there was no necessity for implying cross remainders between the issue male of the nieces, as the intention was that the limitation to the daughters of each

<sup>1</sup> *Nom. Taaffe v. Ferrall*, 10 Irish Ch. N. S. 183.

niece should take effect immediately after the failure of  
 \*issue male of each; that Mrs. Taaffe did not take by sur- \* 68  
 vivorship the estates limited to the other two nieces for their  
 lives respectively, but that on the death of Daniel Ferrall the limi-  
 tation to each of the nieces took effect in possession.<sup>1</sup> This appeal  
 was against that decision.

*Mr. Rolt*, and *Mr. John O'Hagan* (of the Irish bar) (*Sir H. Cairns* was with them), for the appellants. — After the death of Daniel Ferrall without issue, the estates given to the nieces were to be with benefit of survivorship. The direction that they are to take as tenants in common and not as joint tenants, will not prevent the word the “survivor” of them having full effect. That word cannot be rejected. The survivor here is Mrs. Taaffe, who is entitled to the whole estate during her life, and on her death it will go equally to her son and to the son of Mrs. Nolan, as tenants in common in tail male. The object of the testator was to secure the descent of his estates in a male line, and, with that object in view, he postponed giving any interest to the daughters of his nieces until there should be a general failure of the male issue of those nieces. No daughter of any niece can take any thing till that event occurs. The respondent therefore takes nothing under the will. *Doe d. Borwell v. Abey*<sup>2</sup> is the leading case on the subject. There the gift was to sisters, as here to nieces; they were to take “as tenants in common and not as joint tenants,” and Lord Ellenborough said that those words rather regulated the mode of enjoyment than described the estate which the sisters were to take, and so gave effect to the clause of survivorship. *Haddelsey v. Adams*<sup>3</sup> adopts that doctrine. Although survivorship is not incident to \*a tenancy in common, the two things may be \* 69 combined by the express words of a will, or by implication where that is necessary to effectuate the meaning of a testator, *Jarman on Wills*.<sup>4</sup> It is necessary here, so that it might be implied, but it is actually expressed.

Words of survivorship are to be referred to the period of division and enjoyment, *Cripps v. Wolcott*.<sup>5</sup> “If he should die” and “in case of their demise,” have been construed “when he

<sup>1</sup> *Conmee v. Taaffe*, 12 Irish Ch. N. S. 338.

<sup>2</sup> 1 Maule & S. 428.

<sup>3</sup> 22 Beav. 266.

<sup>4</sup> Ch. 47, pp. 633, 656.

<sup>5</sup> 4 Madd. 11.

should die," *Smart v. Clark*; <sup>1</sup> *Bowen v. Scowcroft*.<sup>2</sup> The period to which the survivorship relates depends on intention, *Newton v. Ayscough*,<sup>3</sup> and where such a word was used and was followed, as to the gifts over, by the words "after their demise," it was held that the gifts over did not take effect till the death of all the beneficiaries, *Malcolm v. Martin*.<sup>4</sup> In *Holmes v. Meynel*<sup>5</sup> a devise to two daughters and their heirs equally to be divided between them, and in case they happened to die without issue, over, was held to make them tenants in tail in common with cross remainders in tail. *Roe v. Clayton*<sup>6</sup> is referred to by Lord St. Leonards<sup>7</sup> as a case where "cross remainders were raised between several classes of issue by a liberality of construction, which however unauthorised by the early authorities, must now be considered as the settled rule," and that case was brought up to this House, and the decision of the Court below affirmed. There the gift was to a niece for life, remainder to trustees, remainder to the niece's first and other sons successively in tail, and for default of such issue, to her daughters as tenants in common in tail, "and for default of  
\* 70 such issue, to the issue of \* my four sisters in tail, in such manner as I have limited the same to my niece's issue." As all his estate was to go over (and here the testator always deals with the estates in their entirety) it was held that there were cross remainders amongst the daughters of the testator's niece. *Doe v. Webb*,<sup>8</sup> and *Green v. Stephens*<sup>9</sup> are to the same effect, and in the last-named case, and in *Watson v. Foxon*,<sup>10</sup> the introduction of the word "respective" in the devise to the nieces and "their respective heirs,"<sup>11</sup> was declared not to affect the implication of cross remainders. *Comber v. Hill*<sup>12</sup> is on that point overruled, and the qualification stated by Lord Mansfield in *Pery v. White*<sup>13</sup> adopted.

The words of this devise were not employed *per incuriam*. The intention is clearly manifested, for the will contains a power to charge the estates for the benefit of daughters, so that they were not left unprovided for; and it also contains a direction that no

<sup>1</sup> 3 Russ. 365.

<sup>2</sup> 2 Younge & C. Exch. 640.

<sup>3</sup> 19 Ves. 534.

<sup>4</sup> 3 Brown, Ch. 50.

<sup>5</sup> T. Raym. 452, 2 Show. 135.

<sup>6</sup> 6 East, 628, 1 Dow, 384.

<sup>7</sup> Sugd. Law of Prop. 283.

<sup>8</sup> 1 Taunt. 234.

<sup>9</sup> 17 Ves. 64.

<sup>10</sup> 2 East, 36.

<sup>11</sup> See the case stated, 12 Ves. 419.

<sup>12</sup> Str. 969.

<sup>13</sup> Cowp. 777.

son of any niece shall take any benefit under the will unless he assumes the testator's family name ; but the estates themselves are to go to sons alone. [LORD CHELMSFORD referred to *Cook v. Gerard*.<sup>1</sup>]

Assuming that the estates here were for life only, still the doctrine of cross remainders is applicable, *Ashley v. Ashley*.<sup>2</sup> If that is not so here, then the sons of the daughters would be excluded in favour of a female who might be the right heir of the testator, a consequence which most certainly it was his object to avoid.

In the Court below, the case of *Waldron v. Boulter*<sup>3</sup> \* was relied on, but there the limitation over was on the \* 71 death of the grandchildren, "or any or either of them," so that the two cases are quite unlike each other. Here the true reading of the will is, on the death of the surviving niece the tenant for life, to give the estates to the sons of the nieces. The daughters of the nieces can only take when all the preceding objects have failed.

*The Solicitor-General (Sir R. Palmer) and Mr. Lloyd* (of the Irish bar), for the respondents. — The words of this will expressly create among the nieces a tenancy in common and negative a joint tenancy. The doctrine of survivorship is therefore inapplicable to them. The first object of the testator was to establish an equality among his nieces, and the children of each were intended to take just what their respective mothers took. This object would be totally defeated by making the female issue of one or of two nieces dependent entirely on the accident of the third niece having issue male. The word "survivor" is of little effect in this will for the purpose now insisted on. It was not introduced into the will for any such purpose. Its object was to provide against the possibility of one of the nieces dying during the life of D. Ferrall, so that by force of that word the other two would take the estates intended originally to have been divided among all three. It did not mean survivorship *inter se* after the estates had vested in possession. Its position in the present will shows that to be so. Here the interest is first given, and then the word "survivor" follows, exactly in opposition to the form in *Doe d. Borwell v. Abey*,<sup>4</sup>

<sup>1</sup> 1 Wms. Saund. 180.

<sup>2</sup> 6 Sim. 358 ; *Pearce v. Edmeades*, 3 Younge & C. Exch. 246.

<sup>3</sup> 22 Beav. 284.

<sup>4</sup> 1 Maule & S. 428.



died, and the question was what estate they took, and whether the heir of Jane should have the moiety during the life of Elizabeth, and it was held that they were joint tenants during life, and that the fee went to the heir of Jane, but not to be taken during the life of Elizabeth. So in *Hawkins v. Hamerton*,<sup>1</sup> the estate was held to vest at once, and the children of a daughter, who died during her mother's life, were held to take their parents' share on the happening of the death of their grandmother. And *Montgomery v. Montgomery*<sup>2</sup> is a strong authority for the respondent. There the testator devised to his son W. for life and no longer, unless M. should survive his present wife and marry another, by whom he should have issue living at the time of his death, then to the  
 \* 75 issue male of \* the second marriage share and share alike ;  
 for want of issue male to the issue female of the second marriage, share and share alike ; if W. died without issue, then over. W. did marry a second time, and left male issue of that marriage, and it was held that W. took an estate for life only with concurrent contingent remainders in fee first to his sons, secondly to his daughters, and lastly to his grandsons. Here the fee is given to the nieces, and is vested in each of them and their heirs male, and on the failure of her heirs male in her daughters, and there is no necessity for any purpose of the will to declare that cross remainders exist. The sons are clearly entitled to take *per stirpes*, and there is nothing which establishes, in that respect, a difference between them and the daughter.

*Mr. Rolt* replied.

April 3.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this is an appeal from a decretal order pronounced by the Lord Chancellor of Ireland upon a special case stated under the provisions of the Irish Court of Chancery Regulation Act of 1850. The question involved in it depends upon the construction of the will of a gentleman of the name of John Ferrall. He appears to have been entitled to very large landed estates in Ireland. By his will he devises those estates by gifts, which in effect amount to a limitation of the estates to his nephew, Daniel Henry Ferrall, for life, with remainder to his first and other sons in tail male ; and then there

<sup>1</sup> 16 Sim. 410.

<sup>2</sup> 3 Jones & L. 47.

is a remainder for default of such issue male, or in case he antecedently dies, to the testator's nieces, which is expressed in the following way. [His Lordship here read the devise, see *ante*, p. 65.]

\* The only other provision in the will which appears to me \*76 to have a bearing upon the question before your Lordships is the next clause, by which it is directed that the issue male of the said Julia, Rose, and Bridget shall not take any benefit under the will unless they assume the name of Ferrall, instead of their own name.

The Lord Chancellor of Ireland, in deciding this case, had principally to consider the effect of the first words of the limitation in question, by which the gift is made to the three nieces "and the survivor of them for the term of their natural lives," and then he had further to consider the effect of the words, "and for default of such issue male." And the Lord Chancellor, in his judgment, appears to have arrived at this conclusion that the word "survivor" must either be rejected as insensible and repugnant to the general manifest intention of the will, or be referred to the death of Daniel Ferrall, which (the Lord Chancellor proceeds to say) he believes to be the correct construction: "or at all events it must be considered as so uncertain in its meaning as to be incapable of controlling the previous distinct language." With regard to the words, "and for default of such issue male," which it had been contended were sufficient to raise an implication of cross remainders, the Lord Chancellor of Ireland observes, "If the will had gone on, leaving out any mention of the daughters, simply to say, 'and in default of such issue male remainder to my right heirs,' there would have been no great difficulty in implying cross remainders in tail between the nieces or their sons; but the actual will, as respects the daughters, throws insuperable difficulties in the way of this construction."

The case has been most ably and elaborately argued at the bar in support of the conclusion stated by the Lord \* Chan- \*77 cellor of Ireland; but I am unable to concur in the construction of that learned Judge. I cannot agree with him in either of the two conclusions at which he has arrived.

I will take first the interpretation of the word "survivor," and what ought to be regarded as the effect of the prior part of the limitation in question, although it is not necessary that your Lord-

ships' decision should be founded upon it, because I think this is a case in which cross remainders ought to be implied. It may not be an inexpedient thing to consider the true interpretation of the antecedent words.

It is undoubtedly true that, so far as decided cases are concerned, there is much difficulty in fixing, with reference to the gift of real estate, the true interpretation of the word "survivor." After many fluctuating decisions, the rule laid down by Sir John Leach in the case of *Winterton v. Crawford*<sup>1</sup> has, with regard to bequests of personal estate, been pretty generally adopted, and I think with great advantage. But it is by no means clear that the same rule has been adopted with regard to the interpretation of the word in a devise of real estate. In gifts of personalty the word may be taken as referring to the period of distribution. In gifts of real estate it ought to be referred, if the same rule were applied, to the determination of the prior limitation. But some of the cases interfere with this conclusion, and I agree with the observation of the learned author, Mr. Jarman, that it must be left to future decisions to tell what is the actual rule of construction applicable to this perplexing word in reference to real estate.

I think it not possible, and I think it would be very  
 \*78 \* dangerous, to attempt to derive from decisions any certain and general rule of interpretation of the word, or of the period to which it ought to be considered as referring. But there is another and a simpler meaning of the word, which I think is the true meaning in this case. The natural and obvious meaning of the word "survivor" is not the person who shall survive or outlive a particular event, but, when it is applied to a class of persons, and individuals of that class are named, the natural and obvious meaning of the word is the longest liver of those who are named; and, therefore, in this particular case, as in other cases, the word "survivor" should, I think, be regarded not as referring to any particular event previously mentioned, but as referring to that which, as I have already observed, is the natural meaning of the word, namely, that individual person who, out of the individuals named, shall turn out to be the longest liver.

It has been sometimes objected that this interpretation of the word "survivor," cannot be adopted where there is a gift to several persons as tenants in common, not as joint tenants. But there

<sup>1</sup> 1 Russ. & M. 407.

is obviously a very great distinction between the limitation of survivorship that is involved in a gift of joint tenancy, and the limitation of the word "survivor" which is annexed to a tenancy in common. The survivorship involved in an estate in joint tenancy is that which is capable of being defeated at the pleasure of the joint tenant, so that if, by alienation or otherwise, the joint tenancy is converted into a tenancy in common, the survivorship ceases; but when a gift to the "survivor" is annexed to a tenancy in common and not to a joint tenancy, then the limitation takes effect by virtue of the gift, and not by virtue of something involved in a limitation of joint tenancy. There is no difficulty, therefore,

I apprehend, in putting \*this construction upon the antecedent words of this gift, that the limitation was to the three \* 79 nieces as tenants in common for life, with a cross limitation or remainder as to the estate of a niece dying, first to the two surviving nieces as tenants in common for life, and then a further limitation as to the estate of the niece next dying, to the "survivor" of the three nieces also for life. Thus every word of the antecedent limitation has its natural effect given to it, and then the words of the gift over introducing the remainder, also have thus a full and entire effect attributed to them. For the words of the gift limiting the remainder are "from and after their decease to the use of their first and every other son and sons lawfully begotten," and the heirs of those sons. The limitation of the remainder, then expectant upon the death of the survivor of the three nieces, is to the class of the sons of those three nieces, with a direction that the sons of each niece, *inter se*, take severally and successively in the order of seniority. The class of persons, therefore, taking upon the death of the surviving niece, will be the eldest sons of the three nieces, Julia, Rose, and Bridget, in equal proportions. And if there has been no son born of one of the nieces, then the limitation takes effect in favour of the sons of the other two nieces. So that I should read the antecedent part of the will as operating in the following way, creating a limitation to the three nieces as tenants in common for life, with remainder to the survivors and survivor of the three nieces for life, with remainder to the eldest sons of the three nieces as tenants in common in tail male.

My Lords, the effect of that interpretation will be to give the present appellants, that is, the son of Rose and the son of Bridget, a limitation in remainder expectant upon the death of Bridget

\*80 as tenants in common in tail \* male ; and if that interpretation be adopted, the words upon which the Lord Chancellor of Ireland has founded his conclusion, as giving to Catherine, the daughter of Julia, an immediate fee simple estate to the extent of one third of the devised estate, will be entirely disposed of, and no estate will arise in favour of the daughter until the entire failure of the antecedent limitation to the sons of the other two daughters.

But supposing we adopt the construction which has been allowed by the Lord Chancellor of Ireland, and that we refer the word "survivor" to the event of the contingency of the three nieces being living at the death of Daniel Henry Ferrall without issue male, and by that mode of construction throw aside the word as becoming inoperative in the event which has happened ; if we adopt that construction, we then are brought to consider the interpretation which the Lord Chancellor of Ireland puts upon the words "and for default of such issue."

Now I cannot concur with his Lordship that the implication of cross remainders is here to be made by reason of the gift over being expressly made in favour of the daughters of Julia, Rose, and Bridget. The implication of cross remainders depends upon the form of the expression introducing the gift over, after the limitation of the prior clause.

My Lords, the law upon this subject unfortunately has been perplexed by a variety of contradictory decisions relating to the construction of gifts over. Originally, nearly two hundred years ago, the interpretation which I think has now been adopted, was the interpretation settled in an early case in *Dyer*,<sup>1</sup> and also in the case of *Holmes v. Meynel*.<sup>2</sup> Some difficulty was afterwards

\*81 \*introduced by a notion which was entertained that this doctrine implying cross remainders must be limited to cases where the gift was to two objects alone. And after that difficulty had been got over, another doctrine was started which may be described as the introduction, into words such as we have here "for default of such issue," of the words "several and respective" which, it was for some time supposed, would have the effect of preventing the implication of cross remainders by giving over the share of each tenant in common. That appears to have been first

<sup>1</sup> Clache's Case, *Dyer*, 330 b.

<sup>2</sup> T. Raym. 452, 2 Show. 135.

introduced by the case of *Comber v. Hill*,<sup>1</sup> and it gave birth to numerous decisions, until the whole of the distinction was denied by Lord Kenyon in the case of *Watson v. Foxon*,<sup>2</sup> and it must be considered, I think, as finally exploded in the case of *Doe v. Webb*,<sup>3</sup> and also by the decision of Lord Eldon in the case of *Green v. Stephens*.<sup>4</sup> I find it nowhere suggested that the character of the devisees over makes or ought to make any distinction.

I arrive, therefore, my Lords, at the conclusion that the words "for default of such issue male," in conformity with their own natural meaning, and also in conformity with the rule that must now be considered to be at length finally arrived at, must mean plainly "for default of all such issue male" as would take under the antecedent limitation. And if that be the natural meaning of the words, and also the meaning which is consistent with the latest and best-considered authorities upon the subject, it would be impossible that the limitation to the daughters could take effect, as to that part of the estate comprised in and affected by the prior limitations to sons, until those prior limitations to sons \* have become wholly exhausted. If the daughters, \* 82 therefore, are to take only when there has been an absolute failure of the antecedent limitation to "issue male," it follows as a matter of course that when there is a failure of issue male of one niece, but there is issue male of another niece, or of both the other nieces, the gift over cannot take effect.

My Lords, I find no difficulty in supposing (as the Lord Chancellor of Ireland seems to do) that there would be an inconsistency in preferring the sons of nieces to the daughters of nieces. We are not to be governed by the consideration of what may appear to us to be an unreasonable disposition. If any thing were wanting to confirm the propriety of arriving at the conclusion that the testator intended to give a preference to issue male, I should refer to the directions given in the 18th clause of the will, as to the assumption by any son of a niece, of the name of the testator.

I must therefore advise your Lordships to declare the construction of the will to be altogether opposite to that which has been pronounced in the Court below. The decision of the Court below has involved an answer to several questions which are contained

<sup>1</sup> Str. 969.

<sup>2</sup> 2 East, 36.

<sup>3</sup> 1 Taunt. 234.

<sup>4</sup> 17 Ves. 64.

in the special case ; but I should think it quite sufficient if your Lordships were to reverse the decretal order of the Lord Chancellor of Ireland, and to declare that, according to the true interpretation of the will of John Ferrall, the remainder limited to the daughters of Julia, Rose, and Bridget "on default of issue male" taking under prior limitations, does not fall into possession until there be a failure of issue male of all the three nieces described in the prior limitations. The effect of that will be entirely to reverse the judgment upon the ground upon which the decision

of the Court below proceeds ; and, inasmuch as the estate \* 83 \* is now held under an agreement between the parties, it seems unnecessary that your Lordships should give any further answer to the questions which are stated in the special case upon which the Lord Chancellor of Ireland made his decretal order. I must, therefore, move your Lordships that this decretal order be reversed, with the declaration I have mentioned.

LORD CRANWORTH. — My Lords, I fully concur with the Lord Chancellor in the result at which he has arrived in this case. The question turns entirely upon the construction which is to be put upon one clause in this will.

The first question is, What is the estate which the three nieces took ? Now, it was argued that each took a separate estate as tenant in common, with remainder afterwards as to each of their thirds, to her first and other sons, and in default of sons then to daughters, and that the now sole surviving niece took only one third for her life.

I think that such a construction cannot be maintained. It would, in truth, make the words "survivor of them" utterly inoperative. The word "survivor" there does not point to the person who was to take the estate by virtue of being "survivor," but to the extent of the interest which the nieces were to take. According to a distinction, which I think was correctly enunciated by the present Master of the Rolls, in the case cited in the argument of *Haddelsey v. Adams*,<sup>1</sup> the word "survivor" here means, not to indicate the person who is to take by surviving at any particular period, but to indicate what interest the three nieces are to take. It is just the same as if, instead of "survivor," it had been the "longer liver."

<sup>1</sup> 22 Beav. 266.

\* The Lord Chancellor of Ireland seemed to think that \* 84 that construction was excluded by the language of the clause, which is, that they were to take as "tenant in common, and not as joint tenants," and that if the survivor took that would be taking as joint tenants. But that, I conceive, with all deference to the Lord Chancellor of Ireland is entirely an erroneous construction. There is no inconsistency in giving an estate to the "survivor," because those who have a life interest are to take as tenants in common, as has been pointed out in several cases; particularly in a case which has been adverted to in the argument, and which occurred in the Court of Queen's Bench of *Doe v. Abey*.<sup>1</sup> There the Court pointed out clearly that there was no inconsistency in saying that certain persons were to take as tenants in common, but with the benefit of survivorship, for that though they had in some respects a less beneficial interest, yet, in other respects, they had a more beneficial interest than as joint tenants. At all events it is sufficient to say it is a different estate, and there is no inconsistency in giving it to the "survivors," though it is said that they are to take as tenants in common.

I, therefore, think it clear that the appellant, Mrs. Taaffe, as the surviving niece, has now the whole interests in her for life, and, subject to her life interest, I think there is a valid gift in remainder, in thirds, to the first and other sons of each tenant for life in tail male, and in default of sons to the daughters of each of the nieces.

Then the question is, whether the daughter of one niece, who died leaving only a daughter, takes in exclusion of the male issue. I think she does not. I shall not repeat \* what has \* 85 been gone over fully by the Lord Chancellor upon the subject of cross remainders. I take it that the doctrine is now well established that whether cross remainders are to be implied or not is a mere question of construction upon the whole face of the will. And wherever there are limitations in tail, or in tail male, "and in default of such issue" a gift over, then I take it that the presumption is, that that means in default of issue of all of them. Now that is the case here. There is a gift to each of the daughters, with remainders to their first and other sons in tail male, "and for default of such issue," then over. I think that means

<sup>1</sup> 1 Maule & S. 428.



in default of all such issue male. That would be the *primâ facie* construction ; and I think that, even if it were not the *primâ facie* construction, there are indications upon the face of this will to show that that was the construction which this testator meant to adopt.

I agree with an observation that was made at the bar, that there is nothing more fallacious than endeavouring, first of all, to find out the intention of the testator, and then to construe the words of the will with reference to that supposed intention. But here I think it is clear that the testator wished that his estate should run in the male line to the exclusion of the female line ; for he gives it first to his nephew and his issue male, and then he constitutes each of those nieces as a *stirps* of a new male issue, and I think that view is strongly confirmed by the circumstance pointed out by the Lord Chancellor, that he desires all the male issue of each of his nieces to take his name, whereas he gives no such direction with regard to the daughters who are to take upon the failure of issue male. If his wish to perpetuate his name could not be,

by reason of the failure of issue male of the daughters,  
 \* 86 \*capable of being fulfilled, then he gave it up and let the thing take its course.

Upon the whole I think that the judgment of the Lord Chancellor of Ireland is wrong, and that the declaration which my noble and learned friend has proposed is the proper one to be made. With respect to the interest of the several parties, there need be no difficulty, because inasmuch as the appellants are the surviving niece and the two sons who take all between them, and who, under disentailing deeds, have the whole among them, it is sufficient for us to say that the appellants are entitled to the estate among them.

LORD CHELMSFORD. — My Lords, I agree so entirely, with the opinions which have been expressed, that I should have abstained from adding any thing to what has been addressed to the House, if I did not feel that it would hardly be proper to dissent from the judgment of the Lord Chancellor of Ireland without stating, however shortly, the reasons which have led my mind to a conclusion opposed to that which he has formed.

It appears to me that the three nieces of the testator took an estate for their lives, and for the life of the survivor as tenants in

common, and not three distinct estates for life, transmissible in their separate lines.

It was conceded in the argument that the creation of a tenancy in common amongst the three nieces was not inconsistent with a remainder of the whole estate to the survivor for her life. But some stress was laid upon the collocation of the words expressing the survivorship, and also upon those words being in the singular number instead of running in the usual form, "for the term of their natural lives, and the lives and life of the survivors and \* survivor of them." This, however, appears to me to create \* 87 no serious objection to the construction which I have adopted. The estate given to the nieces was a vested remainder, after the estate tail to the sons of Daniel Ferrall. The three nieces having survived the testator, the remainder vested in them all. If one or two of them had died in the testator's lifetime, the remainder would have vested in the two survivors, or in the sole survivor. But the remainder to the sons of the nieces could not take effect till the death of the survivor. This appears not only from the words "and the survivor of them," in the devise to them for life, but also from the words introductory to the remainder to their sons, "and from and after their decease," which, following immediately upon the life estate, which was not to end till the death of the longest liver of the nieces, can only be understood to mean after the decease of all of them, and not after their respective deceases.

This view of the devise to the nieces appears to dispose of the whole case. For unless the respondents can establish the scheme of the will to be to give a separate third to each of the nieces, and afterwards to their sons and daughters in separate succession to each, the whole foundation for their construction fails. There can then remain no other manner of construing the will than by holding the gift to the first and other sons, and the heirs male of their bodies, to be a gift to them as a class. If, according to the argument of the respondents, the estate was originally divided among the nieces in thirds, each of which was afterwards settled upon sons and daughters in the separate line of each, there would be no meaning in the words "in equal proportions"; but upon the other construction these words become significant in the event (which has happened) of two only out of the three nieces \* having sons. This view of the will is not interfered with \* 88

by the words "the elder of such sons of each of my said nieces, &c. being always to be preferred and to take before the younger," which fall in just as naturally with the notion of the devise to the sons of each being intended to them as a class, as with the idea of separate limitations in the line of each niece; as their object is merely to regulate the priority in the separate lines where there are sons to take.

This being the opinion which I have formed of the manner in which the sons of the nieces became entitled, it is almost unnecessary for me to consider the question as to the implication of cross remainders. But if any thing were wanting to postpone the interest of the daughters of the nieces until the failure of the sons and their heirs male, the words introducing the devise to the daughters, "and for default of such male issue," would surely be sufficient, as the daughters could not take until all the male line of the sons previously mentioned had failed, which would necessitate the implication of cross remainders between them.

With respect to the interest to be taken by the daughters of the nieces, it was pointed out by my noble and learned friend (Lord Cranworth) in the course of the argument, that the respondent, who is the daughter of one of the nieces, Julia Anne, was alive at the date of the will, and is mentioned in it, and, consequently, on the death of the testator she took a vested remainder. This would open from time to time to let in other daughters of her mother (if she had any), and also the daughters of her aunts. It seems clear that this vested estate could not be a fee, on account of the ultimate devise to the use of the testator's own right heir.

\* 89 If it were necessary to construe this devise to the \* daughters of the nieces, I should be disposed to think that the daughters would take estates in tail. The words which introduce the ultimate remainder to the right heir are "in default of such issue male and female." These words cannot mean in default of sons and daughters of the nieces, because there is a previous limitation to the heirs male of the bodies of the sons to which the words "issue male" would more naturally refer. If the words "issue male" cannot refer to sons, the words "issue female," which immediately follow, cannot refer to daughters. And this construction being excluded, there is no other which will satisfy the evident intention of the testator than one which will postpone the estate of the heir at law till an indefinite failure of issue male

and female. The decision of the previous points of the case, however, renders it unnecessary to enter more particularly into this last question.

LORD KINGSDOWN entirely agreed with the judgment proposed by the Lord Chancellor.

A question was raised as to costs.

Their Lordships thought that the difficulty had been created by the testator himself; that the principle on which, under such circumstances, costs were ordered to come out of the estates, applied here; and as all the parties interested were before the House, there was no difficulty in making the order.

The following order was afterwards entered on the Journals : —

“ That the decretal order of the Court of Chancery in Ireland, of the 15th of February, 1861, be reversed; and it is hereby declared that, according to the true interpretation \* of the will \* 90 of John Ferrall, the remainder limited to the daughters of Julia Anne Conmee, Rose Ferrall, and Bridget Ferrall, on default of issue male taking under prior limitations, does not fall into possession until there be a failure of issue male of all the three nieces described in the prior limitations; and it is further ordered, that the costs of this appeal, both of the appellants and of the respondent Catherine Conmee, by Mathew Conmee, the committee of her estate, be paid out of the real estate the subject of the appeal. That the cause be remitted back to the Court of Chancery in Ireland, to do therein as shall be just and consistent with this declaration, direction, and judgment.

Lords' Journals, 3d April, 1862.

## EYRE v. BURMESTER.

1862. April 1, 4, 7; May 20.

THOMAS JOSEPH EYRE, *Appellant*.JOHN W. BURMESTER and others, *Respondents*.*Mortgage. Release. Forgeries. Fraud. Accounts.*

E. was the holder of a mortgage on lands given him by John S., who was largely his debtor. John S. afterwards mortgaged these lands to the directors of a banking company as security for existing debts and for some fresh advances. Before these advances were actually made the solicitor for the directors discovered that the lands had been previously mortgaged to E. The directors refused to complete the transaction with John S. unless E.'s interest in the lands was released. John S. represented to them that it would be easy to procure the release, as E.'s mortgage was only a collateral security; he applied to E., who consented to give the release on getting proper securities in substitution for the mortgage. By deeds duly executed between E. and John S., the latter pretended to give substituted securities, among others, railway shares and a promissory note. The release was executed by E. The substituted securities, the shares and the note, proved to be forgeries:—

*Held*, reversing the decree of the Court below, that E. had not, by executing the release, lost his right against the mortgaged lands, \*the release having been obtained from him by fraud, that even if John S. had conveyed the released lands to the directors they could only have claimed under him against E., and that the release, valid against John S. and those who claimed under him, was invalid as against E., who claimed not only not under John S., but against him by title paramount.

It was ordered that if any of the securities obtained by E. when he executed the release, were valid, they were to be taken into consideration in the accounts directed.

THIS was an appeal against a decree of the Lord Chancellor of Ireland.

The appellant had employed John Sadleir as his solicitor.<sup>1</sup> In the course of that employment John Sadleir had obtained money from him to be invested on mortgage securities, which did not appear to be satisfactory. The appellant complained of this conduct, and John Sadleir agreed to give the appellant, by way of security, a mortgage upon certain lands belonging to him, John Sadleir, and situated at Kilcommon and other places in the county of Tipperary.

<sup>1</sup> See the case of *Eyre v. McDowell*, ante, vol. 9, p. 619.

On the 20th October, 1854, John Sadleir executed a mortgage of these lands, subject to redemption on the payment of what was due. J. B. Kennedy solicitor, of the firm of Morrogh and Kennedy, of Dublin, was appointed by the appellant and John Sadleir, the agent of the property. John Sadleir was to be at liberty to sell these lands, the appellant concurring in such sales, and the money produced thereby was to be applicable to the payment of the appellant's claims. This mortgage was registered 19th December, 1854. John Sadleir being deeply indebted to the London and County Joint Stock Banking Company, by deeds dated 2d August and 7th and 8th September, 1855, conveyed to certain persons, as trustees on behalf of that company, various estates (including \* those already mortgaged to the appellant) for the \* 92 purpose of meeting these debts. The conveyances were made to three persons; they were Burmester and Law (two directors of the London and County Bank) and James Sadleir, who, on behalf of his brother, and in his own character of chairman of the Tipperary Joint Stock Banking Company (to which John Sadleir was also indebted), was treated as being interested in the property. The consideration for this conveyance consisted partly of money already due, and partly of a sum of 95,000*l.* then agreed to be advanced to John Sadleir, which sum he represented would be sufficient to clear off all his liabilities. On the 13th August, 1855, Mr. Stevens, of the firm of Wilkinson and Stevens, the solicitors for the London and County Bank, carried the deeds to Dublin, and applied at the offices of Messrs. Morrogh and Kennedy there, to obtain their assistance in registering these deeds. Mr. J. B. Kennedy, on examining them, informed Mr. Stevens that some of the estates included in them were already mortgaged to the appellant. This information was sent to London, and the directors of the London and County Bank refused to proceed with the business unless the appellant gave a release of his mortgage. Mr. Wilkinson saw John Sadleir on the subject, and was told by him that there would be no difficulty in procuring the release, as the mortgage was merely a collateral security. John Sadleir did apply to the appellant for this purpose. Letters passed between John Sadleir, Mr. Kennedy, and the appellant, and the consent was obtained. John Sadleir intimated this fact to the London and County Bank, and the advance which had been part of the consideration for the deeds of the 2d and 7th August, but which had not been actually

made at that time, was then completed. On the 5th October, 1855, the appellant executed a deed, of release (registered 20th \* 93 November, 1855,) which had the \* effect of reconveying the lands to John Sadleir, who made no fresh conveyance of them to the respondents. Articles of agreement, under seal, dated 6th October, 1855 (but not actually executed till the 13th October, 1855) were made between John Sadleir of the first part, the appellant of the second part, and James Sadleir of the third part. The articles recited the mortgage of the 20th October, 1854, and that the appellant had consented, instead of the securities given by that deed, to accept the securities after mentioned, and to release the lands in the manner expressed in the deed of the 5th October, 1855; that John Sadleir had handed over to Eyre 20,000 shares of 5*l.* each in the Royal Swedish Railway Company, bearing interest at five per cent.; in consideration of which premises, it was witnessed that John Sadleir assigned these shares to Eyre, subject to be retransferred to John Sadleir, if Eyre should be repaid his advances by other means; and John Sadleir covenanted that the shares were in full force and in no way forfeited or encumbered; and for a further security John Sadleir covenanted before the 1st January then next, to convey the Coolnamuck estate described as consisting of lots 1, 2, 5, 7, 8, 9, 10, 11, and 12,<sup>1</sup> and the fee and inheritance thereof, to Eyre; and John and James Sadleir covenanted that if any delay should be made in the payment of the interest or dividends secured by these articles, to the full amount in each year of 5000*l.* at the least, John or James Sadleir would pay such sum as would make up the deficiency. And whereas John Sadleir had indorsed to Eyre a promissory note of W. Dargan, Esq., for 12,000*l.* payable in May, 1856, it was agreed that Eyre might receive the amount of the said note, \* 94 but that he should still be entitled \* to receive 5000*l.* in each year, in addition thereto, and whereas under the deed of October, 1854, 3000*l.* would become payable to Eyre on the 20th of that month of October, out of the rents and profits granted by that deed, John Sadleir covenanted that he would before the 1st November then next, pay the said sum of 3000*l.*, and that such payment should not be deemed a part payment of the 5000*l.* so thereby secured.

<sup>1</sup> See ante, vol. 9, p. 619.

All the three parties executed these articles of agreement. The railway shares and the promissory note were forgeries.

John Sadleir committed suicide in February, 1856.

In June, 1856, the trustees under the deeds of August and September, 1855, presented a petition to the Encumbered Estates Court, praying that the lands conveyed to them under those deeds of August and September, 1855, might be sold to pay off encumbrances. The estates were sold, and by an order of the Master of the Rolls, of the 20th June, 1857, it was directed that the proceeds of the sale should be vested in the persons named in the deeds of September, 1855, as trustees for the London and County Bank. On the 3d May, 1858, a draft schedule of encumbrances on the estates was filed by the respondents; but the name of the appellant was not therein mentioned. On the 23d June, 1858, the appellant filed his objections to the schedule, setting forth the facts already stated, and claiming to be entitled as encumbrancer on these estates under the deed of 20th October, 1854, as fully as if he had not executed the deed of reconveyance of the 5th October, 1855, which had been obtained from him by the fraud and forgeries of John Sadleir. The respondents answered this affidavit of objections, insisting that the appellant had executed the deed of 5th October, 1855, under the professional advice, \* and with the assistance of Kennedy, and consequently \* 95 with full knowledge of the facts; that they, the respondents, knew nothing of the defectiveness of the securities for his advances which the deed of October, 1854, had been given to secure, and that his reconveyance to John Sadleir had put an end to his claim to the estates comprised in that deed.

On the 31st October, 1859, Judge Longfield made an order declaring the deed of release of 5th October, 1855, to be valid as between the appellant and the respondents. This order was taken by appeal to the Court of Chancery, and on the 30th May, 1860, by a judgment of the Lord Chancellor Brady and the Lord Justice Blackburn, was affirmed. The present appeal was then brought.

*Mr. W. M. James* and *Sir H. Cairns* (*Mr. Edmond Beales* was with them), for the appellant. — The deed of release was obtained by fraud, and the knowledge of Kennedy does not bind the appellant, for Kennedy acted more in the character of solicitor to John Sadleir than to the appellant; and he was employed, too, as the



agent for the bank in putting deeds on the register. [Reference was made to the evidence to establish these facts.] The deed of release was taken to Ireland, and was delivered by Kennedy, not to the bank, but to John Sadleir, in whose possession it continued till his death. On his death it was found, and handed over as a matter of course to the bank for the benefit of which it appeared to have been executed. Any pretence therefore of notice to the appellant through Kennedy fails. No doubt the appellant had entered into an agreement to execute a release of these lands on receiving genuine securities. These he did not receive. The bank

did not purchase this deed, gave no consideration for it; for,  
 \* 96 in truth, \* whatever the bank did was done before the deed was executed. It was not, therefore, a purchaser of the

benefit given by this deed, but was a stranger to the deed in fact as well as law. The directors had rested satisfied with the promise of Sadleir that he would obtain a release. That could not affect the appellant; *Hatchell v. Cremorne*<sup>1</sup> was a much stronger case than this. There A., being entitled under a deed of 1784 to a charge affecting the estate of B., executed in 1814 a release (for which no consideration was actually given), in order to enable B. to sell the estate for the payment of creditors claiming under a previous trust deed: a decree to account and report the priority of encumbrance was made. The release had not been impeached in any way; but it was held that the charge of A. retained its priority under the deed of 1784, except as to purchasers who had bought upon the faith of the release. Unless that case is distinctly overruled it is decisive of the present. So in *Cobbett v. Brock*<sup>2</sup> the same principle was adopted. There the deed was enforced because those who sought to enforce it were really purchasers for valuable consideration. [THE LORD CHANCELLOR referred to Lord Commissioner Rawlinson's opinion in *Hitchcox v. Sedgwick*,<sup>3</sup> where Sir John Fagg's case was cited.] Those were instances in which an innocent purchaser was protected; but the respondents here, as representing the bank, were not purchasers. Here John Sadleir might be treated as taking the release as a trustee for the bank; but if he obtained that by fraud it cannot confer a beneficial interest on the bank, *Scholefield v. Templer*.<sup>4</sup> It was there laid

\* 97 down that by seeking to derive a benefit under \* a fraudu-

<sup>1</sup> Lloyd & G. temp. Plunk. 236.

<sup>2</sup> 2 Vern. 159.

<sup>3</sup> 20 Beav. 524.

<sup>4</sup> H. R. V. Johns. 155, 4 De G. & J. 429

lent transaction, or to retain any benefit resulting therefrom, a third person, however innocent of the fraud in its inception, became *particeps criminis*. Then the principle in the *National Exchange Company v. Drew*,<sup>1</sup> and the *New Brunswick Company v. Conybeare*<sup>2</sup> applies, and the company is bound by the acts of its agents. Here the evidence shows that before the transaction was completed between John Sadleir and the respondents, they were aware of the prior encumbrance to the appellant. It was a fallacy in the Court below to say that the respondents got this property discharged from the appellant's encumbrance. John Sadleir got it in that way by means of the release; but he never conveyed the released property to the respondents. They had no conveyance but of the property upon which the appellant had a prior encumbrance. And it was equally a fallacy to say that unless the respondents could be fixed with a participation in the fraud, they were entitled to hold the property which had been thus acquired. The estate being infected with fraud in Sadleir's hands, it was equally so in the hands of the respondents. They might have a right of action against Sadleir for not doing what he had promised, but that gave them no rights in equity against the appellant. The transaction of the loan was completed before Sadleir was requested to obtain the release. He then promised to obtain it; but he was bound to obtain it in an honest way, and not having so done he cannot retain it, nor can others obtain a beneficial interest in it from him.

\* *The Solicitor-General (Sir R. Palmer) and Mr. Ser- \*98 jeant Sullivan* (of the Irish bar) (*Mr. H. Stevens* was with them), for the respondents. — The evidence here shows that Wilkinson and Stevens were the only solicitors that acted for the respondents, that Kennedy appeared to be acting for Eyre, and that the respondents believed him to be the appellant's solicitor. There is, therefore, no ground whatever for pretending that the claim of the respondents is to be impeached on account of their conduct in the matter. The Swedish Railway shares were undoubtedly forgeries; but the Coolnamuck estate was a valuable property, and the appellant has, by a decision of this House,<sup>3</sup> obtained the benefit of that. The appellant, therefore, stands in no worse situation

<sup>1</sup> 2 Macq. Scotch App. 103.

<sup>2</sup> Eyre v. McDowell, ante, vol. 9, 619.

<sup>3</sup> 9 H. L. Cas. 711.

than the respondents as to security. And the fraud of Sadleir cannot affect the respondents, who are *bond fide* purchasers, *Sturge v. Starr*.<sup>1</sup>

The respondents here are purchasers for value without notice, and that fact is a defence for them against a title whether legal or equitable. *Joyce v. De Moleyns*.<sup>2</sup> The respondents gave valuable consideration for this release. The advance of 95,000*l.* pervaded the whole of the transaction, and what was done under the covenant for further assurance enures for their benefit. [THE LORD CHANCELLOR. — How came the release to be made to John Sadleir alone? that was not in pursuance of the covenant for further assurance.] It was in part performance of the covenant to make the original conveyance effectual. The estate is now in the respondents. It feeds the stipulation created by Sadleir's obligation

to convey to the respondents an unencumbered estate. The \* 99 release \* is an act by Eyre in concurrence with Sadleir's stipulation to convey. [LORD CRANWORTH. — There can be no stipulation of John Sadleir binding as against the appellant.]

There may be, if made with Eyre's knowledge and concurrence. It was so here: Eyre's employment of Kennedy as his solicitor must affect Eyre with the knowledge which Kennedy had of the whole transaction. [THE LORD CHANCELLOR. — The natural conclusion of the transaction would have been a conveyance by Sadleir under his covenant for further assurance. Suppose before that was made Eyre had discovered the fraud which had been practised upon him, could he not have filed a bill to prevent the conveyance?] Put it thus: this was an equitable interest outstanding on an encumbrance — the release by Eyre is a discharge of that encumbrance in favour of the mortgagee — the interest then ceased to have an existence in equity. A conveyance of the equitable interest, after the encumbrance was at an end, would have been a mere idle form, and could not have altered the legal position of the respondents. *Jones v. Kearney*<sup>3</sup> shows that, under circumstances stronger than the present, the new conveyance must be taken as a graft upon the old, and it was there distinctly stated that if a man sells, with a covenant for further assurance, an estate, the title to which is afterwards defeated, and he subsequently acquires a new and valid title to it, equity fastens itself on the new

<sup>1</sup> 2 Mylne & K. 195.

<sup>2</sup> 1 Drury & War. 134.

<sup>3</sup> 2 Jones & L. 374.

title for the benefit of the purchasers. The principle of that case is directly applicable here. The moment there was a discharge of Eyre's interest, the benefit of that discharge enured to the respondents, and there was no other act necessary to give it them.

The estate \* of the appellant had only an existence for the \* 100 purpose of securing a charge. That was discharged by the release, having obtained which, John Sadleir had done all that he was required to do in order to perfect the title of the respondents, and no equitable interest remained in him which it was necessary for him to convey. Eyre knew that he was going to give a release for the benefit of the persons for whom a charge on the property had been created. Under such circumstances he cannot be allowed subsequently to say, as to such persons, that he was defrauded out of the release, *Cobbett v. Brock*.<sup>1</sup> There was negligence on his part or he could not have been defrauded. He neither made inquiries of the Swedish Railway Company, nor of Mr. Dargan; he trusted himself entirely to John Sadleir. The respondents were not bound to make these inquiries, nor are they to suffer for his fault in not making them. A purchaser is not bound to inquire into the arrangements between his vendor and the vendor's encumbrancer, *Jones v. Powles*.<sup>2</sup> The conveyance to the respondents had no condition connected with it. And as "against a purchaser for valuable consideration, without notice, the Court will give no assistance," *Phillips v. Phillips*.<sup>3</sup> Here, too, the deeds were in the custody of John Sadleir, who held them as trustee for the respondents, and, under such circumstances, they have an advantage over the first encumbrances of which a Court of equity will not deprive them, and there is no necessity for them to get in the legal estate in order to secure this advantage, *Stanhope v. Earl Verney*.<sup>4</sup> [THE LORD CHANCELLOR. — That is because at that time a termor \* could not maintain ejectment without producing \* 101 the demise. The law on this matter is explained in *Maundrell v. Maundrell*.<sup>5</sup>]

The advance of the 95,000*l.* made by the respondents, though made before the release was executed, was as good a consideration as if the money had been advanced at the moment.

*Mr. W. M. James* replied.

<sup>1</sup> 20 Beav. 524.

<sup>2</sup> 3 Mylne & K. 581.

<sup>3</sup> 31 Law J. N. S. Ch. 321.

<sup>4</sup> 2 Eden, 81.

<sup>5</sup> 10 Ves. 271.

May 20.

THE LORD CHANCELLOR (LORD WESTBURY).—My Lords, the facts material for the decision of this appeal are few, and may be shortly stated. In October, 1854, the late Mr. John Sadleir made a mortgage to the appellant, Mr. Eyre, of certain estates in Ireland, to secure the payment by Sadleir to Eyre of considerable sums of money. Afterwards, and in September, 1855, John Sadleir, being very largely indebted to the London and County Joint Stock Bank, conveyed these estates and other large estates in Ireland to the respondents, who represent the bank, to secure such debt and further advances then made by the bank to Sadleir. No mention was made by Sadleir to the respondents of the fact of the mortgage to Eyre; but the estates in question were conveyed by Sadleir to them as free from any encumbrance. Before this mortgage to the bank was completed by registration of the deeds in Ireland, the fact of Eyre's mortgage was discovered by the agents of the respondents, who therefore refused to allow the arrangement between Sadleir and themselves to remain unless he obtained a release from Eyre of the estates in question. This Sadleir

\* 102 engaged to do; and he prevailed upon Eyre \* to execute a deed of reconveyance to Sadleir himself of these estates, in consideration of Eyre's receiving from Sadleir other securities of equal or greater value. The substituted securities consisted chiefly of a large number of shares in the Royal Swedish Railway, and of a promissory note for 12,000*l.*, expressed to be made and signed by Mr. Dargan. But the shares were fictitious, having been fabricated by John Sadleir for the purpose, and the promissory note was a forgery. An actual fraud of a gross and criminal character was therefore committed by Sadleir upon Eyre; and by means of that fraud the release of Eyre's mortgage was obtained.

The release was contained in a deed dated the 5th, but executed on the 13th of October, 1855. By it Mr. Eyre reconveyed, granted, released, and confirmed unto John Sadleir the estates comprised in the mortgage deed of October, 1854. No consideration for this reconveyance is expressed in the deed itself, but the real agreement between the parties is contained in a contemporaneous agreement of the 6th of October, 1855.<sup>1</sup>

After the execution of this deed of reconveyance to John

<sup>1</sup> See this agreement stated, ante, p. 93.

Sadleir no further conveyance was made by Sadleir to the respondents. They were assured of the fact of the reconveyance, and the mortgage was either completed or allowed to continue. The estate so reconveyed by Eyre remained in John Sadleir until he committed suicide in the month of February, 1856. On that event, the fraud of Sadleir was discovered.

These estates have been since sold by an order of the Encumbered Estates Court in Ireland. With respect to the proceeds of that sale, a contest has arisen between Eyre and the London and County Bank; Eyre claims the \*benefit of his original \*103 mortgage, and insists that the reconveyance is void for fraud. The bank directors claim the benefit of the reconveyance as purchasers for valuable consideration, without notice of the fraud committed by Sadleir on Eyre, and on that ground the Court below has given judgment in their favour.

A purchaser for valuable consideration without notice, will not be deprived by a Court of equity of any advantage at law which he has fairly obtained for his protection. But in the present case the estate reconveyed by Eyre, remained in Sadleir, and was never conveyed by Sadleir to the bank. In answer to this objection, the respondents insist on the estoppel created by the previous conveyance. This answer would be good as against Sadleir and all claiming under him. The estoppel created by the antecedent contract and conveyance by Sadleir would bind parties and privies, that is, Sadleir and those claiming under him. But the claim of Eyre is against Sadleir by paramount right, to recover the estate of which Eyre had been deprived by fraud, and Sadleir acquired no interest to feed his prior contract by virtue of that fraudulent transaction.

It is urged by the respondents that the reconveyance when made by Eyre enabled Sadleir to obtain money from the bank, and that the mortgage was completed on the faith of the reconveyance. The evidence does not appear to me to prove either of these positions. But granting that it does, the reconveyance was to Sadleir and was obtained by him by fraud and covin. There was no contract or direct communication between the respondents and Eyre, who acted with perfect *bona fides*. The respondents left Sadleir to obtain the reconveyance, and they can claim the benefit of it only under Sadleir, whose act they must take as it is. If (which is not proved) \*they had advanced money to Sadleir on \*104

the faith of the release and their actual possession of it, but without taking a conveyance, they might have had a lien on the deed itself; but their interest in the estate being equitable only would still, in my opinion, have been subject to the superior equity of Eyre. Whilst the estate remained in Sadleir, so long was it liable to be pursued and recovered by Eyre. But there is no sufficient proof of any such advance by the bank; and the only foundation of the bank's claim is the mortgage by Sadleir prior to the deed of reconveyance. That mortgage and contract would bind any interest subsequently acquired by Sadleir. But under the reconveyance he obtained none; for, as between Sadleir and Eyre, the latter was still the owner, and might at any time during the life of Sadleir, by bill in equity have set aside the release, and obtained a reconveyance of the estate, and an interim injunction to restrain any alienation of it by Sadleir. This equitable title still remains unimpaired, and ought to be preferred to any claim by the bank.

I therefore advise your Lordships that the orders of the Court below be reversed, and that it be declared that the claim of the appellant to priority in respect of his mortgage, ought to have been allowed; and that the case be remitted, with that declaration, to the Landed Estates Court. If the appellant has obtained any additional security under the agreement of the 6th October, 1855, not comprised in his original mortgage, that must be given up or accounted for to the bank.

LORD CRANWORTH. — My Lords, the deed by which the appellant conveyed to John Sadleir his equitable interest in the lands in question, was executed by him on the 13th of October,  
 \* 105 \* 1855. Nothing was done altering the rights of the appellant and the respondents under that deed, between the time of its execution and the death of John Sadleir. So that the question as to their rights may be considered as if it had arisen immediately after the execution of that deed.

Suppose then that the appellant had, on the day after he executed the deed, discovered the fraud which had been practised on him, and had then immediately filed a bill against John Sadleir, and prayed that he might be directed to reconvey the property to him, what defence could Sadleir have set up to such a bill? I can discover none. The fraud practised on the appellant would

certainly have entitled him to the relief sought in such a bill, unless Sadleir could have shown that there were rights in third persons, which presented a bar to what would otherwise be a very clear equity.

Suppose then that Sadleir had insisted on the claims now made by the respondents, as precluding him from reconveying the estates to the appellant, and that they had consequently been made co-defendants, what case could they have presented to the Court? They might have said truly that they had advanced a very large sum of money to John Sadleir, on his assurance that he would, by way of security, convey to them the lands in question free from the appellant's encumbrance, and so that the conveyance executed by the appellant on the 13th of October, though made to John Sadleir, was in truth made to him on their behalf. But this would have amounted to no more than an allegation that what John Sadleir took by the conveyance in question, he took as their trustee. The appellant might well assent to this proposition; for what Sadleir so took was only an estate liable to be defeated by the appellant, on the ground of the fraud practised \*on him. \*106 In such a case the *cestui que trust* can be in no better situation than the trustee. Whatever would be an answer to one, would be an answer to the other.

When the appellant executed the conveyance to Sadleir, all the advances by the respondents in respect of which they claim to consider it as having been executed for their benefit, had been already made. But they contend that their equitable rights are to be considered as having arisen, not when the deed was executed, but at an earlier date; that is, at the time when the appellant agreed to execute it. They say that on the faith of an assurance by the appellant that he would release the lands in question from whatever claim he had on them, they made the advances, or a part of the advances, for which they claim to have a charge on those lands; that on the faith of his promise to release the lands, they altered their position, and so are equitably entitled to say that his conveyance was a conveyance made for their benefit.

There can be no doubt, as a proposition of law, that if a person who has a charge on lands, enters into a valid agreement with the owner to release his charge for the purpose of enabling the owner to raise money on mortgage, and on the faith of that agreement communicated to the mortgagee, the mortgage is made, then the



person who has the prior charge can never set it up against the mortgagee who has advanced his money in confidence that the prior charge would be released. But here there are no facts to warrant the application of such a principle. An attention to the dates of the various dealings among the parties, makes this abundantly clear.

Mr. Wilkinson's report to the bank, which led to the advance of 95,000*l.* to John Sadleir, was made on the 31st of July, \* 107 1855 ; and on that same day the directors agreed \* to make the advance. On the following day (i. e. 1st August), John Sadleir executed to the bank twenty deeds of conveyance of his different Irish estates, in trust for sale ; three of these conveyances were conveyances of the land already mortgaged to the appellant, but they contained no reference to that prior mortgage. On the 13th of August, prior to which day 70,000*l.*, part of the 95,000*l.*, had been already advanced to John Sadleir, Stevens, one of the solicitors of the bank, having gone to Dublin for the purpose of causing the twenty deeds to be registered, was informed by Kennedy of the existence of the appellant's mortgage ; and he immediately communicated the information so received to Wilkinson, his partner, by letter, and to John Sadleir by telegraph, both of them being then in London. On that same evening John Sadleir wrote to the appellant, who was at Bath, proposing to substitute other securities for that comprised in his mortgage of the 20th October, 1854, and suggesting to him that he should refer to Kennedy the task of carrying the proposed alteration into effect. On the next day (the 14th), the appellant sent John Sadleir's letter to Kennedy, who was in Dublin, together with a short letter from himself, saying little more than that Kennedy's letter would speak for itself. On the 17th Kennedy arrived at Bath, and there discussed with the appellant the proposed substitution of the new securities, in the place of those which he then held ; and late at night on the same day he reached London and had an interview with John Sadleir. On the following day (Saturday the 18th) Kennedy had a long interview with John Sadleir, when the terms of the proposed arrangement were fully discussed. After which he wrote a long letter to the appellant at Bath, detailing the particulars of the proposed new securities, and enclosing the \* 108 form of a letter to be written by the appellant, \* if he should decide on accepting the arrangement. The appel-

lant being satisfied with Kennedy's letter, wrote and sent to Kennedy, on the 20th, a letter according to the form which he (Kennedy) had sketched, and which is in the following words : —

“ BATH, August 20, 1855.

“ DEAR SIR, — Upon the terms stated in your memorandum of the 18th instant, I will release the Irish estates of Kilcommon, Shebane, Boygaun, Castlegrace, and Clowmore, from the indemnity given me upon them under the deed of the 20th of August, 1854, and I request you will prepare the necessary documents for my signature.”

The date, 20th August, 1854, given as the date of the deed, is evidently a mistake for 20th of October, 1854.

Up to this time the appellant had certainly done nothing binding him to release his original security; and before this time the whole of the 95,000*l.* had been advanced by the bank to John Sadleir, or to his brother James, to whom he authorised the bank to pay the money on his account.

The evidence as to this part of the case stands thus : 70,000*l.*, part of the 95,000*l.*, had been advanced before Stevens discovered, on the 13th of August, the existence of the appellant's security. The remaining 25,000*l.* were paid on the 15th to James Sadleir by direction of his brother John, in two checks on the bank, one for 10,000*l.* the other for 15,000*l.*, both of which checks were presented to and paid by the bank on the 17th. It is certain, therefore, that no part of the 95,000*l.* was advanced in reliance on the appellant's agreement to release his security, though undoubtedly the last sum of 25,000*l.* was advanced on the assurance of John Sadleir that he would obtain such a release from the appellant. This, \* however, could have no other effect than that \* 109 of making John Sadleir, when he obtained the release from the appellant, a trustee for the respondents of whatever he so obtained; and this, as I have already said, would not have enabled them to set up against the appellant any ground of defence not open to John Sadleir himself.

It was argued on behalf of the respondents that the whole 25,000*l.* cannot be considered as having been advanced till after the 20th of August, when the appellant agreed to substitute the new for the old securities. The ground of this argument was, that

though the two checks for 10,000*l.* and 15,000*l.* were paid by the bank on the 17th of August, being three days before the appellant's engagement of the 20th, yet the 15,000*l.* cannot be considered as having been really paid till some days afterwards. James Sadleir, who was employed by his brother John in applying the 95,000*l.* in liquidation of numerous demands on him, applied the 15,000*l.* check in taking up a promissory note for that amount, which had been given by James to the respondents for securing the repayment of money advanced by them to him, and which fell due on the 17th. But the respondents, it seems, retained the note for some days afterwards, by way of security that the registration of all the deeds given to them by John should be duly completed in Dublin. And, therefore, it was argued, the advance was not fully made till after the transaction relative to that note was concluded. I cannot attribute any weight to that argument. The note which the respondents held was given by James Sadleir expressly as a security for an advance to himself, and to secure his own debt. The bank refused to treat it as a matter in which John was concerned; and when, therefore, on the final advance of the 25,000*l.* James allowed the bank to continue to hold the

\* 110 note as a \* security that the deeds should all be duly registered, that was a mere private arrangement between him and the bank, to which John was an entire stranger. It was a security given by James to protect the bank, but in no respect altered the relation between John and the bank.

It must not, however, be understood as being my opinion that even if the advance of the whole 95,000*l.* had been subsequent to the appellant's agreement to release his security, but prior to the deed of the 18th of October, this would have destroyed the equitable rights of the appellant as against the bank. In such a state of circumstances the respondents might have had an equitable right to compel the appellant to perform his contract with Sadleir, that is, to release his original security on having the new securities substituted. To this the appellant would not, I presume, have objected. But I see no ground for thinking that, even in such circumstances, the release being fraudulently obtained, without giving to the appellant the proposed new securities which constituted the consideration for his release, could be set up against him by the bank any more than by John Sadleir himself. If indeed the release to Sadleir had preceded the advance of the money, and

if that advance had been made on the faith of the title which the release gave, or appeared to give, to John Sadleir, the case would have been different. The bank would then have altered its relation with John Sadleir, relying on what was in effect a representation by the appellant under his hand and seal, that so far as related to his security, the title of John Sadleir was clear; and it would be no answer to the bank, by the appellant, to say that his execution of the deed had been obtained by means of a gross fraud practised on him. The respondents might truly say they were no party to the fraud, and had acted on the faith of \* a deed which he had executed, and which they had a \* 111 right to presume, and did presume, had been fairly obtained from him. But this was not the real state of the circumstances. It is certain that all the money had been advanced long before the deed was executed, in reliance on John Sadleir's assurance that such a deed should be obtained. John Sadleir did obtain a release, but he did so by means of a fraud, which made the deed void in equity as between him and the appellant; and the equitable right of the appellant to get himself restored to the situation in which he stood before the fraud practised on him, is paramount to all other equitable rights which have not accrued to innocent persons, ignorant of the fraud, and acting on the faith of the instrument executed by the appellant.

On these grounds, I am of opinion that the order of the Court of Appeal in Chancery in Ireland, bearing date the 30th of May, 1860, was erroneous, and ought to be reversed; and that the Court ought to have declared, in conformity with the appellant's petition of appeal to that Court, that the appellant is entitled to a lien on the proceeds of the sales of the lands comprised in the mortgage of the 20th of October, 1854, according to the rights conferred by that deed, as if the deed of the 5th of October, 1855, had never been executed, and with that declaration ought to have remitted the matter to the Landed Estates Court.

LORD CHELMSFORD. — My Lords, the Court of Appeal in Ireland decided this case in favour of the respondents, on the short ground that they were purchasers for valuable consideration, without notice, and were therefore entitled to the benefit of the release obtained from Eyre, upon the covenant for \* further \* 112 assurance contained in the deed of the 1st August, 1855.

and also upon the agreement of John Sadleir, to procure the release; the advance of the 95,000*l.* made by the bank pervading the whole transaction. The learned Judges appear not to have thought it necessary to enter into any consideration of the conflicting equities of the parties; upon which, however, the question of their respective priorities essentially depends. The release of his security by Eyre as between him and John Sadleir was absolutely void; but it is contended on behalf of the respondents, that Eyre is estopped by the circumstances of the case from denying to the respondents the benefit of this release; and the real question in the case is whether, although Eyre's deed had no operation as between him and John Sadleir, the respondents have a right to insist upon its being effectual to remove Eyre's security out of their way.

It is worthy of remark, that Eyre derived no advantage at all from the transaction respecting the release; but that it was of great importance to the interests of the bank, and of John Sadleir. The respondents had actually advanced 70,000*l.* to John Sadleir before they were informed of the existence of Eyre's deed. They had, therefore, the strongest motive to endeavour to improve their own security, by refusing to complete the proposed loan until a release could be obtained from Eyre; and John Sadleir was interested in obtaining the release, that he might not lose the unpaid portion of the advance of 95,000*l.* The respondents and John Sadleir had, therefore, one common object in the transaction with Eyre; and through their solicitor, were regularly informed of the progress of the negotiations to procure the release, and were aware that Kennedy was employed to conduct them to their

\*113 termination. On the other hand, Eyre was \*ignorant that the release was required for the purposes of the respondents; a fact which appears to have been studiously concealed from him throughout the transaction. The subject was introduced to him by the letter of John Sadleir of the 13th August, 1855, by which he was induced to believe that what he was called upon to do was in accordance with the proviso contained in the indemnity deed of the 20th October, 1854.

It was said in argument for the respondents that Eyre knew that John Sadleir was about to deal with some other person, and wanted the release for that purpose. But all that Eyre knew was what John Sadleir chose to tell him, which was, that he was pro-

posing to transfer "the lands included in the deed, to enable him to pay up on all his shares in the Royal Swedish Railway, and to provide for other payments, such as calls on the East Kent shares"; and Kennedy, in his affidavit in the Landed Estates Court, says, "that Eyre, to his knowledge, was not aware of any transactions relating to the lands between John Sadleir and the London and County Bank, nor that John Sadleir was indebted to the bank, or that the reconveyance and release proposed to be executed, had any reference whatever to any security given or to be given by John Sadleir to the bank affecting the lands."

But the respondents seek to affect Eyre with knowledge of John Sadleir's transactions with the bank, on the ground that they were known to Kennedy, who acted as his solicitor in the matter of the release; and they contend that it is therefore not open to Eyre to assert his ignorance of the bank being purchasers of the release for valuable consideration. Kennedy was the person who informed Stevens, the solicitor to the bank, of the existence of Eyre's security, and "he knew that the bank had agreed to advance a large sum of money for the purpose \* of relieving John \* 114 Sadleir from his pressing liabilities; that part of the money had been already advanced, and that the mortgage to Eyre must be either released or satisfied immediately, or the bank would not advance any more money, or carry out the arrangements with John Sadleir." Now, although Kennedy, in the faithful discharge of his duty to his client, ought to have communicated to him these circumstances, which he must have known that John Sadleir had intentionally concealed, yet if the knowledge possessed by Kennedy is of such a nature as to be properly imputed to his client, the question would arise, what effect it would have upon the rights of Eyre as against the bank? It was contended on the part of the appellant that it is not every description of knowledge possessed by a solicitor employed in any particular transaction that can be treated as the actual knowledge of the client. All matters affecting the title to property, or the interests of other persons in connection with it, all circumstances which would entitle parties to equitable priorities, or change the character of rights which depend upon want of notice, if known to the solicitor, have the same effect as if actually known to the client. But I am not aware that this imputed knowledge has ever been extended to matters which have no reference to rights created or affected by the trans-

action, but which merely relate to the motives and objects of the parties, or to the consideration upon which the matter in hand is founded.

Suppose, however, it should be assumed that Eyre knew all that was known to Kennedy, and that he therefore knew that John Sadleir wanted the release for the respondents, who were purchasers of it for valuable consideration, what would be the consequence? Could it be said that this would restrain him in  
 \* 115 conscience from disputing \* the validity of the release actually given, notwithstanding that it had been fraudulently obtained from him?

It is insisted that Eyre must be bound by the letter of the 20th August, 1855, to release the estates. But to whom was he bound? Not to the respondents, for with them he entered into no engagement. He undertook with Kennedy, as the solicitor of John Sadleir, to release, upon the terms of the memorandum of the 18th August, 1855. These terms were, that he was to have in lieu of his existing security, genuine Swedish Railway shares, and a genuine promissory note of Mr. William Dargan, for 12,000*l*. The respondents were cognizant of all that was going on.

When Kennedy was about to proceed to Bath to procure the release from Eyre, in a letter of the 16th August, 1855, he informed Stevens, the solicitor of the bank, of his intentions. When the arrangements with Eyre were concluded, Kennedy communicated the fact to Stevens, in a letter of the 18th August, 1855, in which he expressed a hope that he should have the necessary deed executed in a week or ten days. On whose account was this letter written? Certainly not on account of Eyre, for he had nothing to do with the transaction between John Sadleir and the respondents, nor can he be presumed in any way to have authorised Kennedy to write this letter. Upon the intimation which it contained, the respondents proceeded to complete the advance of the 95,000*l*. to John Sadleir. They did not advance their money upon the release itself, but upon the faith and expectation that a release would be executed. They relied upon John Sadleir, and not upon any agreement with Eyre. They might have secured themselves (but did not) by being made parties to the deed of release from Eyre, or by taking the release to themselves. They clearly acted  
 \* 116 improvidently \* and incautiously. On the other hand, no blame can justly be imputed to Eyre. He agreed, in ac-

cordance, as he supposed, with the terms of his original deed, to give a release upon having genuine securities substituted for the one which he held. He received instead, fabricated and worthless documents, and executed a deed which was wholly inoperative as between him and the releasee.

What equity, under these circumstances, can the respondents have to insist that the deed shall be available to give them a priority over Eyre's security? The release was obtained from Eyre by Sadleir's fraud and forgery. He has failed to procure for the respondents what he promised them they should have. They, trusting to him, have been deceived and disappointed, and must abide by the consequences. They have, in my opinion, not a shadow of equity against Eyre to have the validity of this deed established so far as their interests are concerned; but Eyre is entitled to repudiate the transaction altogether, and to have the deed delivered up to be cancelled. I am clearly of opinion that the decree appealed from ought to be reversed.

LORD KINGSDOWN. — I entirely agree with your Lordships in this case. I had prepared, at some length, the reasons which have led me to the same conclusion; but after the full explanations which have been already given of this case, I think it better to spare your Lordships the trouble of hearing those reasons.

The following order was afterwards entered on the Journals: —

"That the order of the Landed Estates Court in Ireland, dated 31st October, 1859, and the order of the Court \*of Appeal in Chancery in Ireland, dated the 30th of \*117 May, 1860, be reversed; and it is declared, that the appellant is entitled to priority over the London and County Bank in respect of his mortgage deed of the 20th of October, 1854, in the proceedings mentioned. And it is ordered, that the cause be remitted back to the Landed Estates Court in Ireland, to do therein as shall be just and consistent with this declaration and judgment."

Lords' Journals, 20th May, 1862.



## BETTS v. MENZIES.

1861. June 28; July 1, 2, 3. 1862. February 27; June 5.

WILLIAM BETTS, *Plaintiff in error*.R. D. MENZIES and T. WILDEY, *Defendants in error*.<sup>1</sup>*Patent. Specification. Construction. Evidence. Jury.*

Where two specifications, of different dates, relating to the same external objects, contain terms of art, though the expressions used in both are identical, their construction cannot be declared to be the same without the meaning and use of the terms of art employed therein being first ascertained by evidence, and being shown to be the same at the date of both the specifications.

An antecedent specification declaring a principle, but not disclosing a practicable mode of obtaining a result, is not to be held to be an anticipation of a subsequent specification relating to the same matter which does disclose a practicable mode of producing the result. If the latter specification alone supplies that practicable mode, it forms the groundwork for a valid patent.

D. in 1804 took out a patent for making "a new article of trade, which I denominate Albion metal, and which I apply" to various purposes, such as the facings of cisterns, coffin furniture, "and other things which are required to be made of a flexible," &c. substance. D. stated in his specification the principle of his invention, and that he proposed to unite lead and tin by pressure, but he did not state the exact proportions of the two metals, nor give with precision the mode by which they were to be combined. It did not appear that the patent had been acted on.

In 1849 B. took out a patent for "a new manufacture of capsules, and of  
\* 118 a material to be employed therein, and for other purposes." \* The new material was to be composed of lead and tin combined. B. specified the proportions of the two metals, gave the details of the mode of working in order to combine them, and did not claim the production of the new material, except according to the directions he had given for its production:—

*Held*, that this was not a case in which the Court, looking at the two instruments, could determine the validity of the latter patent as a matter of construction only; \* that evidence must be resorted to; and that then it was apparent that the earlier patent only stated a principle, and that the latter patent, as it did not claim the discovery of the principle, but only a new mode of carrying it into effect, was valid.

In this case the plaintiff had brought an action against the defendants for an infringement of certain letters patent, granted to him 13th of January, 1849, in respect of an invention of "a new manufacture of capsules, and of a material to be employed therein,

<sup>1</sup> *Simpson v. Holliday*, Law Rep. 1 H. L. 318.<sup>2</sup> *Ralston v. Smith*, 11 H. L. Cas. 234.

and for other purposes." The defendants pleaded first, that the plaintiff was not the true and first inventor of the said supposed new manufacture. Secondly, that the supposed invention was not a new manufacture; and also, that the patent had not been granted as alleged; that it was not duly enrolled; and, not guilty. Issue was taken on all these pleas.

The plaintiff's specification stated the invention in these terms: "The new manufacture of a material to be employed in the manufacture of capsules, and for other purposes, consists in combining lead with tin, by covering the lead with tin over one or both surfaces of the lead, and reducing the two metals in their conjoined state into thin sheets, of a thickness suitable for the purposes to which they are to be applied. And for the purpose of so preparing lead by covering the same with tin as aforesaid, I first cast the molten lead in an ingot mould of cast iron (or other suitable material), and constructed in the usual manner of ingot moulds for metal, and of \* suitable internal dimensions for produ- \* 119 cing ingots of lead, which (for the manufacture of the material for capsules), may be between four and five inches wide by about three quarters of an inch thick, and about thirty inches in length, with a few inches at one end of each ingot, gradually reduced in thickness in the manner of a wedge. I also cast tin, either into similar ingots of the same, or nearly the same description as the aforesaid ingots of lead; or the tin may be cast into long thin strips, of nearly the same width as the aforesaid ingots of lead, and between one quarter and one sixteenth of an inch in thickness, and several feet in length. And having thus obtained the lead and the tin in suitable states for beginning the rolling or laminating each of the two metals separately between a pair or pairs of revolving cylindrical flattening rollers, of the construction usually employed for rolling or laminating ductile metals, I pass and repass the lead one or more time or times through or between such rollers, that is to say, rolling and rerolling the ingot of lead as many times as may be requisite for reducing the lead to about one fourth of an inch in thickness, and thereby the ingot of lead will become greatly elongated. And in like manner I roll and re-roll the tin as many times as (according to its original thickness when cast as aforesaid) may be requisite for reducing it to about one twentieth part of the thickness to which the lead is reduced by rolling as aforesaid, whatever that thickness may be. The lead

and the tin having been thus reduced to their proper relative thicknesses, and their widths being nearly alike, and even surfaces of each of the two metals having been obtained by the aforesaid rolling, then, in case it is intended to cover both sides of the lead with tin, I extend a long strip of the thin tin (so reduced to relative thickness as aforesaid) flatways upon a smooth

\* 120 \* table, and lay a shorter strip of the lead (so reduced to relative thickness as aforesaid), very evenly upon the extended tin, with one end of the said strip of lead conforming with one end of the said long strip of tin, and then I fold back the tin over the other end of the lead (being that end thereof which still retains some of that wedge-like form of the original casting of the ingot of lead already mentioned), and consequently, the tin when so folded will apply to both surfaces of the lead ; I then cut off the long strip of folded tin to correspond with the length of the lead ; and I smooth down the tin with any convenient wooden rubber, or otherwise, so as to take out all wrinkles in the tin, and bring it very evenly into superficial contact with the lead, and with the two bordered edges of the strip of tin, conforming everywhere with the two border edges of the lead, so as to insure that the tin shall cover the lead as completely as can be done ; I then take up the lead and tin together from off the said table, and present the folded end of the tin to a pair of revolving flattening rollers, which are set so as to subject the two metals to a very considerable pressure, and that pressure, at the same time that it reduces the thickness and elongates the two metals, will also cause their surfaces to adhere together, and then I repass the conjoined metal again and again between the said rollers for further reduction and elongation, and at every succeeding time of so repassing, the adhesion of the two metals will become more complete, and when the strip of conjoined metals is thus become elongated to a considerable length, I find it is convenient, for further repetitions of the rolling, to gather up the said strip (as fast as it comes out from between the said pair of flattening rollers) into a spiral coil.” The specification went

on to describe how the combined metal thus prepared was  
 \* 121 again to be rolled as often “ as \* may be requisite for reducing the said strip of conjoined metals to the required thinness. For the manufacture of capsules the material so prepared is cut into discs of pieces of the required size.” It then stated that the material might be applied to several other purposes, be-

sides that of making capsules, and went on thus: "I am aware that it has been proposed to cover lead with tin, by applying the tin, when in a state of fusion, to the lead when adequately heated, so that the adhesion of the two metals would be produced by the agency of heat with the complete fusion of the tin; but the adhesion of the two metals in my new material is produced by the agency of mechanical pressure. And I wish it to be understood that I do not claim the exclusive use of the several processes hereinbefore described or referred, of casting, cutting, and rolling, except when the same are employed for the purposes of my said invention. And I hereby declare that I claim, firstly, the manufacture of the new material, lead combined with tin, on one or both of its surfaces, by rolling or other mechanical pressure, as herein described; secondly, the manufacture of capsules of the new material of lead and tin combined by mechanical pressure, as herein described."

The cause was tried before Lord Campbell at the Middlesex Sittings after Trinity Term, 1857, when the plaintiff's specification having been put in, and witnesses examined, the defendants, for the purpose of disproving the alleged novelty of the invention, produced the specification of a patent granted to Thomas Dobbs, a chemist of King's Norton, in Worcestershire, dated in September, 1804. Dobbs described his invention as "a new article of trade, which I denominate Albion metal."

Dobbs's specification was in these terms: "My said invention consists in plating, coating, or uniting lead with \*tin, \*122 and also the various alloys or mixtures, as the case may require, which, when done, I denominate Albion metal, and which I apply to the manufacturing of cisterns, linings for cisterns, covering and gutters for buildings, boilers, vats and linings, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance."

"The operation of coating or plating lead with tin, or coating or plating alloyed lead with tin, or with alloyed tin, to make Albion metal, I perform by various methods, as hereafter described; that is to say, I take a plate or ingot of lead, or alloyed lead, and a plate of tin, or alloyed tin, of equal or unequal thicknesses, and laying them together, their surfaces being clean, pass them between the rolls of a flattening or rolling mill with what is technically called a hard pinch, so as to make the metals cohere. If after the first

passage of the plates or pieces of metal between the rolls the plates or pieces do not sufficiently cohere, I pass them a second or third time or more between the rolls, until a sufficient degree of cohesion is produced.

“ N. B. — It will be useful, if not necessary, to have the rolls and the metals hot when the cohesion of the metals is to be effected by their passage between the rolls, especially when the alloyed pieces of plates are used. When lead or alloyed lead is required to be coated or plated on both sides with tin, or alloyed tin, I apply a plate of tin or alloyed tin on each side the plate or piece of lead, or alloyed lead, and pass them between the rolls of a mill under the circumstances aforementioned ; or the same may be effected by taking a plate which is already coated or covered on one side with tin, or alloyed tin, which I double with the lead side inwards, and pass it through the rolls, as before described, to

\* 123 obtain the proper \* degree of cohesion. I also make Albion metal by the following method: I cast a plate of ingot of lead, or alloyed lead, and as soon as it is set or congealed, I cast tin or alloyed tin upon it, or under, or on all sides of it, which will cohere with the piece of metal first cast, and the Albion metal thus prepared may be wrought or flatted, by the usual means of rolling, hammering, or pressing.”

Scientific witnesses and workmen were examined on both sides, and Lord Campbell at first asked the jury “ whether the process described in the plaintiff’s specification was described in the specification of Dobbs, or was ever practised under it.” The jurors deliberated for a little time, and his Lordship then asked “ whether they thought that a person of ordinary skill, reading Dobbs’s specification, and having no other information upon the subject, could at once proceed to make Betts’s metal, not previously making experiments, and getting on bit by bit.” The jurors answered this question in the negative, and his Lordship then directed the verdict to be entered for the plaintiff. A rule was afterwards obtained to set aside this verdict, and enter a verdict for the defendant, or have a new trial ; and Lord Campbell, and the other Judges of the Court, thinking that the first question he put to the jury was right, but that that which he finally asked suggested a defective test for decision, the rule for a new trial was made absolute.<sup>1</sup>

<sup>1</sup> 8 Ellis & B. 923.

The second trial came on before Mr. Justice Earle, at the Westminster sittings after Hilary Term, 1859, when the questions put to the jury were, first, " Was the manufacture as described in Betts's specification a new manufacture of a new material by the process therein described ? " The jury found a verdict for the plaintiff. Leave was reserved \* to move to enter a ver- \* 124 dict for the defendants. A rule for that purpose was obtained, on the grounds, first, that the plaintiff had manufactured the capsules for sale before the date of the patent ; secondly, that the invention was included in Dobbs's patent ; thirdly, that if the proportions were material, the specification was defective in not pointing out the proportions to be employed when the combined metals were to be used for other purposes than the making of capsules ; and, fourthly, that the specification was defective in not distinguishing between what was new and what was old, especially in reference to Dobbs's invention. The rule also asked, in the alternative for a new trial, on the grounds, first, that if the proportions were material, the direction ought to have been that the specification was defective for not clearly stating, or at least leaving uncertain, the proportions when the combined metal was to be used for other purposes than capsules, or the Judge ought to have asked the jury whether the specification was sufficient in that respect ; and, secondly, that the verdict was contrary to the evidence.

The Court, after argument, made this rule for entering a verdict for the defendants absolute, but as to the part of the rule which asked for a new trial, suspended its decision till after a Court of error should have decided on the other point.<sup>1</sup> By a majority of Judges in the Exchequer Chamber the decision of the Court of Queen's Bench was affirmed.<sup>2</sup> Error was now brought in this House.

The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Wightman, Mr. Justice Williams, \* Mr. \* 125 Justice Byles, Mr. Justice Blackburn, and Mr. Baron Wilde attended.

*Mr. Macaulay and Mr. Grove (Mr. Udall and Mr. Webster were with them) for the plaintiff in error. — The substantial error here is,*

<sup>1</sup> 1 Ellis & E. 990.

<sup>2</sup> 1 Ellis & E. 1020.

that the Court below, mistaking *Bush v. Fox*,<sup>1</sup> treated this as simply a question of construction of a patent: in truth it is a question of fact, namely, whether the specification in Dobbs's patent anticipated that which was included in Betts's patent. The proportions of the materials used, and the particulars of the mode of using them, are essential for the value of the invention. These are not communicated in the patent of Dobbs; they do not appear to have been known; they are communicated in a patent of Betts, which is therefore valid. The earlier patent merely suggests a general idea; the latter shows the mode of working out the idea; that is, therefore, the valuable invention which is properly the subject of a patent. The essence of the claim is the invention of a new manufacture of a material, a new method of obtaining that material. The method is the thing to be secured by the patent. What is required could not be produced by Dobbs's patent. That is a matter of evidence, and not of construction. Dobbs's patent gives no statement of proportions, and yet they are essentially necessary for the success of the invention. The plaintiff expressly disclaims the production of the material, except when that material is produced by his particular process. So to produce it the directions given in his specification, and which are wholly omitted from Dobbs's specification, are absolutely necessary.

\* 126 \* The case of *Bush v. Fox*<sup>2</sup> was inapplicable here, where the specifications are not identical, and where words of art are used; and the Court ought to have acted on the rule stated in *Thomas v. Foxwell*,<sup>3</sup> that, though when the question of the invalidity of a patent is raised by a comparison of the specifications, the question is for the Court, if the two contain expressions of art, they must be explained by evidence; in which latter case the decision of novelty necessarily becomes one of fact. *Neilson v. Harford*<sup>4</sup> does not contradict that rule. In *Hills v. The London Gas Light Company*,<sup>5</sup> the Court of Exchequer acted on it, and refused to pronounce Hills's patent bad on a mere comparison of its language with that used in a patent previously taken out by Laming. There the thing spoken of was "oxides"; but the question was, what oxides, and that was a question of fact. So in *Jupe v. Pratt*,<sup>6</sup> the discovery of a principle was held not to affect a subse-

<sup>1</sup> 5 H. L. Cas. 707.

<sup>2</sup> 8 M. & W. 806, 1 Webst. Pat. Cas. 331.

<sup>3</sup> 5 H. L. Cas. 707.

<sup>4</sup> 5 H. & N. 312.

<sup>5</sup> 5 Jur. N. S. 37.

<sup>6</sup> 1 Webst. Pat. Cas. 144.

quent patent for a new mode to carry it into operation. *Walton v. Potter*<sup>1</sup> is to the same effect.

It was necessary, therefore, for the Court in this case to receive evidence on the novelty and value of the invention; and the case of *Muntz v. Foster*<sup>2</sup> shows that the mere existence of a former patent which had never been worked (and that was the case with Dobbs's patent) would not prevent the validity of another which fully explained the process, and was put into immediate operation. And that, and the *Househill Company v. Neilson*,<sup>3</sup> show that the determination of the Court in a case like the present must be on the evidence and the finding. The statement in a patent that a certain result will follow the process \*there de- \*127 scribed, does not prove itself, and if nothing is done under it it, it is not to be treated as an invention. On the contrary, if an alleged discovery is not acted upon, it may be presumed that it has not been made in a useful form. No statement of a discovery, without a clear disclosure of the means to be employed, can operate to anticipate a patent clearly disclosing those means, and so render it invalid, *Galloway v. Bleaden*.<sup>4</sup>

Suppose these two patents had been pleaded together, without more, the question of the sufficiency of the earlier as an answer to the claim of the later patent could not have been decided without evidence. For example, how can the Court, without evidence, say what "ingots"<sup>5</sup> are, or what thickness of the metals will answer the purpose?

Suppose it was now said that copper and tin would unite by rolling, the House could not adopt that statement without evidence, and certainly could not affect to know by the statement itself what were the conditions on which the union could be effected. If every thing is to be found in the two documents, the Court may decide on them; but if other knowledge is required beyond what they give, then it is not for the Court to decide between them. As, for example, if there was a patent for an elec-

<sup>1</sup> 1 Webst. Pat. Cas. 585.

<sup>2</sup> 9 Clark & F. 788.

<sup>3</sup> 2 Webst. Pat. Cas. 105.

<sup>4</sup> 1 Webst. Pat. Cas. 521.

<sup>5</sup> INGOT [*lingot*, French; or from *ingegoten*, melted, Dutch. Dr. Johnson. *Ingot*, q. d. *inguten*, from *in* and Goth. *gioeta*, Su. *giuta*, fundere. Serenius. Chaucer uses *ingot* repeatedly, for a mould for casting *ingots*]. A mass of metal. — *Todd's Johnson*.

Richardson, Diet. says that *Menage* derives *lingot* from *lingua*, the tongue, on account of its shape, thick at one end and tapering off at the other.



tric telegraph, and it directed iron wire to be employed, and then another man obtained a patent for effecting the same purpose by the use of copper wire, the Court could not, on a comparison of the two patents, say \* that the inventions were the same, but must discover the difference between the two modes by inquiry into facts. On this principle, in *Steiner v. Heald*,<sup>1</sup> the Court of Exchequer held that two patents closely resembling each other, but containing terms of art and commerce, must be made the subject of evidence, and left to the consideration of the jury. Here the difference between the two patents is considerable. Take one example: Dobbs says the surface being clean,— he does not say being even. Now a metallic surface may be cleaned by sulphuric acid, but so cleaned could not be used for the required purpose, for air would intervene to prevent adhesion. This could only be known by evidence. In *Barber v. Grace*,<sup>2</sup> a process for finishing hosiery by pressure between boxes heated by steam was held not to anticipate an invention for finishing hosiery by pressure between heated rollers. The principle there was the same in the two cases, but the mode of working was different. Here every thing but the particular method was disclaimed, and so the patent is good even within the rule in *Tetley v. Easton*,<sup>3</sup> for the decision there proceeded on the ground that there was no sufficient disclaimer of what was old, but that the claim embraced what was old as well as new. That is not so here.

*Mr. Mellor and Mr. Hindmarch (Mr. J. Brown was with them),* for the respondents. — The argument on the other side goes to this extent, that there cannot be any case in which a decision can be come to by the Court, on a comparison of two specifications, until after a trial before a jury. That is in contradiction to the \*129 judgment of the Court of Exchequer in \**Neilson v. Harford*,<sup>4</sup> and of this House in *Bush v. Fox*,<sup>5</sup> which was directly followed in *Booth v. Kennard*.<sup>6</sup> The comparison of the two patents is here sufficient to decide the case. The metals to be combined are the same, and the means to combine them are the same; and all that the plaintiff did was to press them till they were very thin, and apply them to a purpose not actually named in Dobbs's patent,

<sup>1</sup> 6 Exch. 607.<sup>4</sup> 8 M. & W. 806.<sup>2</sup> 1 Exch. 339.<sup>5</sup> 5 H. L. Cas. 707.<sup>3</sup> 2 Ellis & B. 956.<sup>6</sup> 2 H. & N. 84.

but included in the "other purposes" to which that patent referred. The claim of the plaintiff in his patent was for the discovery of a new material, not merely for declaring the proportions in which the metals composing that material were to be mixed together. The same material was the subject of Dobbs's patent. The nature of the two claims must, therefore, be determined by a comparison of the two patents, and for that purpose the course adopted in *Tetley v. Easton*,<sup>1</sup> and declared in *Bush v. Fox*, to be the proper course, is that which ought to have been adopted. When the recent patent appears to be the same as one of a previous kind, the recent patent is *prima facie* bad, and it lies on the patentee to show that there is novelty in his invention, and that he has claimed only what is new, and has not claimed what is old. In *Holmes v. The London and Northwestern Railway*,<sup>2</sup> the patent was held bad for not complying with these conditions.

[THE LORD CHANCELLOR. — There is in substance only one proposition, namely, that the invention in the plaintiff's patent was not a new manufacture at the time of the grant of that patent, because the material part of it was included in Dobbs's patent. But then the plaintiff says that the mere comparison of the two specifications will \* not entitle the Court to say that \* 130 they are the same.] It is a settled rule that the Court must construe all written instruments, and, even where terms of art are introduced into them, must give a direction thereon to the jury, *Hill v. Thompson*.<sup>3</sup> [LORD BROUGHAM. — Suppose there are two things stated to be the invention. You look at the two specifications, and say that they are substantially and materially the same. But suppose there is a little difference, how can the Court ascertain whether that difference is material or not?] The Judge must take on himself to understand the matter in order to direct the jury upon it. [LORD WENSLEYDALE. — Suppose he cannot tell whether the first will work or not? LORD BROUGHAM. — As, for instance, if one man says that lead and tin will cohere by pressure, saying nothing of their relative proportions, or even saying that they are immaterial?] Then the claim of the patent, if made in respect to proportions, should have been confined to the statement of the proportions. [THE LORD CHANCELLOR. — Are you not asking us by mere construction to arrive at the conclusion of

<sup>1</sup> 2 Ellis & B. 956.<sup>2</sup> 8 Taunt. 375.<sup>3</sup> 12 C. B. 881.

fact that Betts's patent is not new?] *Booth v. Kennard*<sup>1</sup> shows that that may be done; and in *Bovill v. Pimm*<sup>2</sup> the two specifications were compared, and it was declared that the construction of the specification was a question of law for the Court, and not for the jury. It cannot be necessary to have recourse to evidence to enable the Court to construe these written instruments. [LORD WENSLEYDALE. — On the question of first discovery or not, it is incumbent on you to show that the alleged discovery was practicable.] Not so as between a first and second patentee;

\*131 and here the plaintiff claims what is already \*known.

The plaintiff's claim is therefore bad, for he claims the whole, and therefore claims every part, *Carpenter v. Smith*; <sup>3</sup> and *Holmes v. The London and Northwestern Railway Company*<sup>4</sup> is still stronger, for there the claim was in terms for an improved method, and it was said that the patentee did not claim the parts, but only the improvement; yet as that was not distinctly shown, the patent was held bad. [LORD BROUGHAM. — Equal or unequal thickness, is that an anticipation of the precise description of relative proportions?] The plaintiff here claims more than the discovery of proportions; he claims what was already known, and would exclude all the world from the use of pressure as the means of making lead and tin cohere. That was published previously, and had become public property. [LORD WENSLEYDALE. — Whether capable of being worked or not?] The patentee who adopts the principle cannot be permitted to say that it may not be worked. *Booth v. Kennard*<sup>5</sup> shows that in a case like the present the only question is whether the second patent is like the first, not whether the first is good for any thing. *Steiner v. Heald*<sup>6</sup> has been relied on by the other side; but that was a case of chemical equivalents, and the mode of treatment of the materials was not the same, and the patented process proposed to render useful an article (spent madder) which had before been thrown away. Under these circumstances a comparison of the plaintiff's specification with the process previously in use was not sufficient. Evidence was necessary, and, of course, it was the province of the jury to decide on the weight of that evidence. So in *Muntz v. Foster*,<sup>7</sup> one

<sup>1</sup> 2 H. & N. 84.

<sup>2</sup> 11 Exch. 718.

<sup>3</sup> 1 Webst. Pat. Cas. 530; 9 M. & W. 300.

<sup>4</sup> 12 C. B. 831.

<sup>5</sup> 2 H. & N. 84.

<sup>6</sup> 6 Exch. 607.

<sup>7</sup> 2 Webst. Pat. Cas. 105.

process was \* for copper and zinc, and it was proved as a \*132 fact that they would not combine to produce the desired result, but that the articles must be "the best selected copper" and "foreign zinc." And in *Barber v. Grace*<sup>1</sup> the difference between the two things employed to produce the same result was considerable. So it was in *Seed v. Higgins*.<sup>2</sup> If a *scire facias* is brought to repeal a patent, and an antecedent specification is produced, the same in substance as that which is the subject of the *scire facias*, the Court must act on what is thus apparent on the face of the two instruments. [THE LORD CHANCELLOR.—And is not the impracticability of the first specification to be considered?] That would be an answer to both if they were in substance the same. [THE LORD CHANCELLOR.—It might not; a small difference of treatment in a chemical matter, or a slight modification of a machine, might render the invention easily practicable.]

*Mr. Macaulay* replied.

THE LORD CHANCELLOR proposed the following questions to the Judges:—

1. Does it appear, on a comparison of the two specifications, that a material part of Dobbs's specification is claimed by Betts in his specification?

2. If so, can the Court pronounce Betts's patent to be void simply on the comparison of the two specifications, without evidence to prove identity of invention, and also without evidence that Dobbs's specification disclosed a practicable mode of producing the result, or some part of the result, described in Betts's patent?

1862. February 27.

\* MR. BARON WILDE.—My Lords, I propose to state the \*133 meaning of the two specifications as I construe them before I compare them. I construe Betts's specification thus: I read the words, "which for the manufacture of the material for capsules may be four or five inches wide, by about three quarters of an inch thick, and about thirty inches in length," as a parenthesis ending at the word "length." If this be correct, the process of manufacture described is described for the new material generally, whether intended for capsules or other purposes. Again, I con-

<sup>1</sup> 1 Exch. 339.

<sup>2</sup> 8 H. L. Cas. 550.

strue the claim to be "the manufacture (or making) of the new material in the manner previously described." That is, I read the words "as herein described" as overriding the whole claim. The particular process previously described thus constitutes the substance of the claim. It is not the uniting of the metals by pressure, nor the rolling of them together, which the patentee lays claim to, but it is the making of a certain definite new material in a definite and limited particular manner.

The invention, therefore, given to the world by Betts was this: That an ingot of lead, previously rolled out till about one fourth of an inch thick, if laid upon an ingot of tin previously rolled out to one twentieth the thickness of the lead, would, if passed through the rollers of a flatting mill, combine together and unite into one substance; the further condition of success being, that the tin be brought very evenly into superficial contact with the lead before subjecting them to pressure together.

On turning to Dobbs's specification, I find an invention described of great generality. The fact disclosed to the public by Dobbs was, that lead and tin in any proportions and in ingots or plates of any size (capable of being pressed between the rollers of  
\* 184 a flatting mill) would, if \* passed once or more through such rollers, unite. And the only further condition of success indicated is, that the surfaces of the metals should be clean.

The result of the comparison thus instituted is, that the general fact stated by Dobbs does include the specific process indicated by Betts. And, if a Court of law were bound to decide on the mere language of the two specifications, it ought, in my opinion, to decide that the publication of the general fact in general terms had anticipated the invention of a specific mode which fell within those terms. But I am of opinion that the Court is not so bound.

Such a rule might obviously work great injustice, as I am about to show. If rolling the two metals in any proportions, and by the general means indicated by Dobbs will succeed, then Betts was anticipated, although he first indicated special proportions and a detailed method. On the other hand, if either the proportions of the two metals or the details of the process specified by Betts, are really indispensable to success, he was an inventor, and was not anticipated by Dobbs. Here, then, is a fact to be inquired into, and one that can only be determined upon evidence, and consequently by a jury. And until this question of fact is solved, the

reality of Betts's invention and the anticipation of it or not by the publication of Dobbs cannot justly be determined.

For these reasons I answer the second question in the negative. I hold the rule to be this: If the terms of the two specifications are identical, and if it is not disputed that the terms of art used in the one have the same meaning as the same terms used in the other, which from the lapse of time between the dates of the two patents may not always be the case, the Court ought to determine that the first publication anticipated the second

\* without evidence, and without any proof that either the \*135 first or second was practicable. If, though not identical, the language used in the two when construed by the Court, describes identically the same process, machine, or manufacture, the Court may (subject to the same remark as to the terms of art) decide at once upon the question of anticipation. But if, after construction, and after the meaning of the parties in the two documents has been ascertained by the Court, there be any difference between the two things described which may be essential or material to the invention, and which is contended by either of the parties to be essential or material to the invention, the Court cannot decide such a controversy; it has neither materials nor means for so doing, and it must go to a jury.

In a word, the Court can pronounce two identical descriptions to portray two identical inventions; but when the descriptions are different, the identity in substance of the two inventions is a matter to be established by extrinsic evidence. Applying this rule to the case in hand, I hold that Mr. Betts, in the proportions of the two metals, in the rolling of the two metals separately before rolling them together, and in other details of his process, has indicated a mode of procedure for making his new material by no means identical with that published by Dobbs. This difference is contended to be essential to the invention; and it may be so; for it may turn out upon evidence that except under the specific conditions pointed out by Betts, the combination of the two metals by pressure, as generally described by Dobbs, is not a practicable thing. The real question of novelty or anticipation is thus dependent upon a fact, and, being so, the intervention of a jury is the necessary result.

\* MR. JUSTICE BLACKBURN. — My Lords, the answer to \*136

the first question proposed by your Lordships depends principally upon the true construction of Betts's specification. That specification contains no words alleged to bear a peculiar meaning requiring explanation, and no surrounding circumstances are alleged to exist bearing on the construction of the instrument. It is, therefore, for the Court alone to decide what is claimed. This must be ascertained by looking at the language used in the specification, and fairly reading it so as to see what was the intention expressed, and this should be done without any reference to the object of the inquiry. Sometimes it is necessary to construe a specification in order to ascertain whether or not any one may, subsequently to the date of the patent, do something alleged to be comprised in it without being guilty of an infringement. In such a case it is for the interest of the patentee to contend that the true construction of the specification includes that thing. Sometimes that same thing having been publicly done before the patent, the object of the inquiry is to ascertain whether the patent is void, because that thing which is not new has been claimed as part of the invention. In such a case it is for the interest of the patentee to contend that the true construction of the specification does not include this thing; but the Court is bound to give the fair interpretation to the language used in the instrument, and say truly what is there described as the invention, whether the effect is favorable to the patentee or not.

The proviso in the patent requires a specification "to describe and ascertain the nature of the invention, and in what manner it is to be performed"; and in complying with that proviso, the patentee must not only describe and ascertain the invention, so as to enable a person who \* reads the specification to use his invention, but he must also disclose fully the best means of using it according to the best of his knowledge. The reasons for this rule, and the authorities showing that the rule exists, are well stated in Mr. Hindmarch's Book, page 165.'

In the present case, Betts represents that he has invented "a new manufacture of capsules, and of a material to be employed therein, and for other purposes." In the specification [see *ante*], he begins to describe the latter part of his invention, and he proceeds to show how he carries it out. He casts ingots of lead, which he states, "for the manufacture of the material for capsules" may be between four and five inches wide by about three

fourths of an inch thick, and about thirty inches in length, &c. He does not explicitly state any dimensions as preferable, where the manufacture of the material is for other purposes. I should guess that he mentioned the width of four to five inches as convenient only with reference to the manufacture of the material for capsules, and that he meant the thickness and length to apply generally, as being the most convenient for the manufacture of the material for all purposes, though he certainly does not in terms say so; but whether this direction as to the dimensions be intended to apply to the manufacture of the material for all purposes, or only to the manufacture for capsules, it seems to me clear that it is, in the passage I have cited, described as a preferable means by which his invention is to be carried into effect, not as an essential part of it. The ingots he says may be of those dimensions; it is never said, nor do I think it was intended to convey to the public mind that they must be of those dimensions.

Betts then proceeds to describe how the lead is to be rolled and re-rolled till it is reduced "to about one fourth \* of an \*138 inch in thickness," and the tin till it is reduced "to about one twentieth of the dimensions of the lead," whatever that thickness may be. The lead and tin having been thus reduced to their proper relative thicknesses, he passes them through a pair of revolving rollers, so set as to subject the two metals to a very considerable pressure, and that pressure, at the same time that it reduces the thickness and elongates the two metals, will also cause the surfaces to adhere; and then he reduces the combined material by successive rollings and re-rollings.

Betts thus certainly points out, as the means by which he carries out the invention, the use of a plate of tin reduced to about one twentieth of the thickness of the plate of lead, which he has already said is reduced by rolling from about three fourths of an inch to about one fourth of an inch, so that, if those dimensions of the lead are adhered to, the tin must be about one eightieth of an inch thick.

There is much afterwards that shows that he contemplated that the tin would in practice be so thin as to require careful smoothing; and it is very probable that the thinness of the tin is important in an economical point of view; and it may be that both the thinness of the tin and the relative proportion of the metals are essential to the successful working of the invention; but it is not



so said. I find nothing in the specification tending to show that Betts describes his invention as limited to the combination of lead with tin, only when the tin is thin, and reduced by lamination to about the relative thickness of twenty and one.

It seems to me that the fair construction of the description, at least so far as I have yet examined the specification, is that \*139 he claims the making of this material \* by adhesion, produced in the two metals, and the subsequent reduction of the combined materials by rolling pressure; and that he merely points out the proportions as the means which, as far as he knew, were the fittest for carrying out the invention. So that if the description had stopped here, it seems to me that any person who read it would know, that if he rolled plates of lead and tin of any thickness, or any proportions, so as to cause them to adhere, and then reduced the combined material, he would put in practice part of what Betts described as his invention.

It is made much clearer to my mind, that this was intended by what follows afterwards. He says, "I am aware" — [See *ante*, p. 121 to the end of the claim.]

Betts might, if the facts were so, have said that though the metals might be made to adhere by rolling or other mechanical pressure, yet the material could not economically be worked in this way, unless the lead and tin bore the relative proportions above specified, and unless the tin was reduced by lamination to about one eightieth of an inch in thickness, and that he claimed as his invention only this improved mode of producing the material; but has he said so? I think that the part of the claim I have just quoted is conclusive to show that he has not said so, and did not intend to say so.

It was said at your Lordships' bar, and truly, that there was no need to have a formal claim in a specification, and that the description of the invention was to be taken from the whole instrument. But though this is quite true, it is clear that great weight must always be given to that part of the description where the patentee expressly sums up the result of what has gone before. It

seems to me that any one reading this latter part of the \*140 specification, with a desire to know what the patentee \* intended to describe as his invention, must see that he meant to claim as his invention the manufacture of a new material produced by causing lead and tin to adhere by mechanical pressure

(which he thought had not been done before) ; that the rest of the specification describes the means by which he put his invention into use, which means, when employed in producing the new material, are also claimed ; but that he does not mean to claim the invention only when worked by those particular means. He expressly disclaims the means, the rolling, &c., except when employed in producing the invention ; but he says nothing which can limit the claim to the invention generally only when put in force in the precise manner prescribed, unless the concluding words " as herein described " have that effect. As to that, I agree with what is said by Mr. Justice Crompton, in the Court below, that if the general claim to the use of the invention were cut down, and limited to the use of the invention in the particular way pointed out, by reason of the words " as herein described," it would be a narrow rule of construction generally working to the detriment of patentees ; and (what weighs more with me) generally giving an effect to specifications different from what the persons drawing them intended, or those reading them understand.

If we suppose that Dobbs's patent had never been taken out, and that some one had, after the date of Betts's patent actually done what is described in Dobbs's specification, viz. " taken a plate of lead and a plate of tin of equal or unequal thicknesses, and laying them together, their surfaces being clean, passed them between the rolls of a flatting mill with a hard pinch, so as to make the metals cohere," though he had done this without attempting to observe the relative proportions between the metals, or reducing the tin to the thinness of about one \* eightieth of \*141 an inch, and if we further suppose (what, perhaps, would not be the fact), that the result had been that the metals did cohere, so as to produce a material similar to Betts's, though it may be in a less perfect state, or less economically made, than if the detailed means in Betts's specification had been pursued, it seems to me clear that Mr. Betts would have had a right to treat this as an infringement of his invention. I think the supposed infringer could not have successfully defended himself on the ground that what he had done was not claimed in Betts's specification.

I therefore answer the first question proposed by your Lordships in the affirmative.

In answering the second question, I must observe that I do not think that any evidence is required to prove the identity of part of

what is described by Dobbs in his specification, and asserted by him to be an invention, with part of the invention described and claimed by Betts. This depends entirely on the construction of the two written instruments. I apprehend that the law is correctly laid down in *Neilson v. Harford*,<sup>1</sup> and that unless there is some controversy as to the meaning in fact of particular words, or some controversy as to the existence of some extraneous facts material for the understanding of the written instrument (in which case those are to be first ascertained), the Court is to construe all written instruments. In the present case there is no such controversy as to fact as to make the Court require any assistance to construe the two specifications, and in answering the first question, I have already stated the reasons which lead me to the conclusion that the invention described and claimed by Betts

\* 142 does comprise a material \*part of what is described and claimed by Dobbs as his invention.

But though the Court can see what the two specifications describe, and can therefore declare that, if what Dobbs has stated in his specification to be his invention, were put in use, it would be an infringement on Betts's patent, the Court cannot tell that what is stated in Dobbs's specification really was an invention at all, or could be put in use.

Now to avoid a patent on the ground of want of novelty, it is, I think, necessary to show that part of what the patentee claims as a new invention, was at the date of the patent already a publicly known invention. This may be shown by proving that the invention was already disclosed in some publication accessible to the public. Several cases in which it has been held that such a publication would be sufficient to render the invention already public property, and so to prevent its being at the time of the patent a new invention, are collected in *Hindmarch on Patents*,<sup>2</sup> and I take it that it is not necessary to show that the invention thus made publicly known, had also been put in actual use. In *The Househill Company v. Neilson*, in your Lordships' House, Lord Lyndhurst (then Chancellor), during the course of the argument said, that if the machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been actually worked, the publication was an answer to the patent; it is continually the practice

<sup>1</sup> 8 M. & W. 806.

<sup>2</sup> Page 107.

on trials for patents, to read out of printed books, without reference to any thing that has been done. This I apprehend is quite correct, as soon as it has been ascertained that \* the \* 143 description in the book makes known an invention ; that is to say, that it adds to the public stock of knowledge, what would, without further discovery, enable a person to produce a result in the nature of a new manufacture ; but I do not think it would be correct to assume that what is asserted in a published work to be an invention, actually is one. There are, I believe, or at all events there might be, publications in which the alchemists have given descriptions in considerable detail of what they said was an invention for the transmutation of metals ; I do not think that the Court could take upon itself, as a matter of law, to pronounce whether the alchemist's supposed invention was, or was not, more than a speculative dream, and I think that the Court cannot take upon itself, as a matter of law, to pronounce whether Dobbs's supposed invention was, or was not, more than a mere speculation. It is true that we know, or think that we know, that the transmutation of metals is impossible, whilst we now know that the production of a material such as Dobbs proposed to make is, at least under certain conditions, practicable ; but that we only know by the aid of evidence. It was stated by Mr. Hindmarch in the course of his able argument, that there was no case reported in which it appeared to have been thought necessary to give evidence, to prove the practicability of the previous disclosure. This, I believe, is correct ; but I do not think it shows that it is unnecessary to ascertain whether the disclosure amounts to an invention. In the great majority of cases there is no dispute as to this ; it is either expressly admitted, or the conduct of the cause is such as tacitly to admit that if the thing was publicly known, it would work ; and when there is such an admission, there is no need of any thing more. Such appears to have been the case both in *Bush v. Fox* and \* in *Thomas v. Foxwell*. But whatever \* 144 the fact may have been, no such admission, either express or tacit, can at this stage of the proceedings be imported into the present case, and your Lordships' question must be answered on the assumption that there was nothing of the sort.

It was ingeniously argued by Mr. Hindmarch that on the face of Betts's specification it appeared that Betts had claimed what Dobbs had described as part of his invention, and that therefore, as against

Betts, there was no need of any evidence to show that the invention was practicable, inasmuch as he was precluded from denying that it was so; but I think this ingenious argument is not sound. A patentee who on the faith of a suggestion to the Crown procures the grant of a patent is, I think, precluded, as against the Crown, from denying the truth of that suggestion, on the principle so well explained in *Freeman v. Cooke*.<sup>1</sup> Whether he would also be precluded as against a private person is a curious question. The individual is not induced to alter his situation by the suggestion; but as his situation is altered by the grant of the Crown which was induced by the suggestion, and the Crown was then acting as trustee for him in common with the rest of the public, it may be that the preclusion exists for the benefit of the individual as well as for that of the crown. But on looking at Betts's specification, I can find nothing amounting to a suggestion that any practical result would be produced by simply rolling together lead and tin in the manner described in Dobbs's specification. Betts describes the mode in which he makes his material, so as to show that he considered a good deal more was desirable for carrying out his invention in the best manner. Dobbs asserts that a particular

\*145 \* mode will alone produce the result. Betts, in my opinion, claims that mode as a material part of the invention by which he produces the result; but he does not anywhere assert that this mode alone will do it.

It seems to me, that if Dobbs had made it part of the public knowledge how to produce a new material as a practicable result, and Betts had afterwards claimed to have a patent for, amongst other things, producing that result, he would have claimed what was not new, but if Dobbs had not made it part of the public knowledge how to produce a result, then Betts would not have claimed any thing already known.

The Court cannot tell without evidence whether what Dobbs disclosed would produce a result, and therefore, as it seems to me, cannot pronounce the first patent void without evidence. I therefore answer your Lordships' second question in the negative.

MR. JUSTICE BYLES. — My Lords, in reply to the first question proposed by your Lordships, I am of opinion that, on a comparison of the two specifications, a material part of Dobbs's specification is claimed by the plaintiff's specification.

<sup>1</sup> 2 Exch. 654.

Dobbs's specification embraces any coating or plating of lead with tin in any proportions, by means of mechanical pressure. But Betts's specification states certain proportions (whether it claims them or not) and certain processes in the application of the pressure, by which proportions and processes the coherence of the two metals may be certainly accomplished. Dobbs's process is the genus, Betts's the species.

In answer to the second question, I am of opinion that a Court of law cannot pronounce Betts's patent void, simply on the comparison of the two specifications, \* without evidence \*146 that Dobbs's specification disclosed a practicable mode of producing the result, or some part of the result, described in Betts's patent.

It does not appear to me, that a comparison of the two specifications shows the two processes to be so far the same, that if the second process with Betts's directions be practicable, the first, with Dobbs's directions, and no more, must have been practicable also.

Without evidence, I think it is impossible to see that Dobbs's process (described in general terms as he has described it) was more than an experiment or a suggestion. It is not imputing to a Court of law an affectation of judicial blindness to say, that without evidence the Court cannot discover whether the previous separate rolling of the two metals, as described by Betts, be or be not essential to the practical success of the process. How can a Court of law without evidence know the relative extendibility of the two metals lead and tin, or judge whether the relative thicknesses of the lead and tin (or about the relative thicknesses), as described by Betts, be or be not essential?

For these reasons, I answer the first of your Lordships' questions in the affirmative, and the second in the negative.

MR. JUSTICE WILLIAMS. — My Lords, I have read the answers of the Lord Chief Baron to the questions put by your Lordships to the Judges, and I agree in those answers, and in the view of the case which he has presented.

THE LORD CHIEF BARON. — My Lords, I was a member of the Court of Exchequer Chamber which (by a majority) affirmed the unanimous \* judgment of the Court of Queen's \*147 Bench, and I was one of that majority. But after hearing

the arguments at your Lordships' bar, and especially that of Mr. Grove, and giving to the subject a fuller consideration, I cannot adhere to the opinion expressed by my brother Martin as his judgment, in which my brother Channell and myself concurred. Not, my Lords, that I doubt, in the smallest degree, the principles of law upon which the Court of Queen's Bench and the Court of Exchequer Chamber professed to decide, but because I doubt whether the law has been correctly applied to the present case ; and I think the mistake (if there be one) has arisen from our attending too much to the matters in which the two specifications agree, and too little to those in which they differ.

They agree in referring to the union of lead and tin by pressing together clean surfaces of each, so as to make them combine superficially ; but they differ in this, that Dobbs's specification apparently includes all proportions, but only for this reason, that it mentions no one in particular, and it gives a very meagre account of the process ; whereas Betts's appears to me to be a patent for a definite relative thickness of the two metals, and it contains a very elaborate description of his process, which requires a separate lamination and rolling of each metal before they are put together, and are rolled and laminated jointly.

The judgment of the Court of Queen's Bench proceeded on the notion that Betts's claim included other proportions than those which he specified for the making of capsules.

It does not appear to me that this is a construction of his specification which is necessary, or even reasonable ; and I think  
 \* 148 it is not correct. Allow me to call your \* Lordships' attention for a moment to the title of the patent and to the specification. The title is, "For a new manufacture of capsules, and of a material to be employed therein, and for other purposes," and it does not appear to me that he claims or specifies more than one thing as his new manufacture. The title expanded, and with the words inserted which are to be understood, would read thus : A new manufacture of capsules, and also a new manufacture of a material to be employed in making capsules, and also to be employed for other purposes.

The patent is, therefore, for capsules, and for the material they are made of, which material is said to be applicable to other purposes.

On examining the specification itself, I find nothing to contra-

dict this view of the plaintiff's invention as derived from the title. He gives an account of capsules, of their use, and of certain patents already obtained for making them. He then gives a clear, distinct account of the mode of making them, and in that he (of course) includes "the new manufacture of the material to be employed in the manufacture of capsules," and the mode of preparing it, with the lead and tin rolled or laminated separately, and then united in certain proportions stated in the specification; and these proportions he considers to be "their proper relative thicknesses." The new material being reduced "to the required thinness," he points out how the capsules are to be made. He then points out that "the said new material or compound metal of lead combined and covered with tin on one or both sides in manner aforesaid" (which I think includes the proportion) "may also be employed for other purposes." The first is for making tinfoil; the next is for certain ornamental purposes; and then he adds, "my said new material being made in plates or sheets of adequate thickness and size, \* may be employed for other purposes, &c." And \* 149 there certainly is not a single expression in the whole specification which suggests that he ever contemplated a union of lead and tin in any other proportions than those which he specifies, and which he calls the "proper relative thickness."

It appears to me, therefore, that he claims, not every combination of lead with tin in any proportion, but only his "new material," as previously described, that is, of the definite proportions, as well as made in the prescribed way.

It is true (as referred to in Lord Campbell's judgment) that, in speaking of the "new manufacture" for the making of capsules, he gives certain dimensions of length, breadth, and thickness which the ingots, or pieces of lead and tin, may have at the commencement of the rolling, and before they are put together; the lead may be three quarters of an inch thick, the tin may be of the same dimensions, or it may be between one quarter and one sixteenth of an inch in thickness, that is, its proportions may be between three to one and twelve to one of lead to tin; but these are not "the proper relative thicknesses" when they are to be united by pressure, which are twenty to one; and there is a part of the specification from which it may be inferred (I own I think conclusively) that he specifies throughout the same relative proportions, and that his new material is to vary in thickness only,



and not in the proportions of lead and tin ; for he says, the “ new material consists,” &c. (describing the process), “ reducing the two metals in their combined state into thin sheets of a thickness suitable for the purposes to which they are to be applied.” The new material is, therefore, to vary in thickness only, and not in the proportion of the metals.

\* 150 \* It appears to me, therefore, that the construction put by the Court below on Betts’s specification (*viz.* that he meant to claim combinations of lead and tin in proportions other and different from those which he specified for capsules), is not justified by the language of the specification. Construing it by the aid of the title, it seems to me that the very same material that was to be applied to the making of capsules was also to be applied to other purposes, being made of adequate thickness, but the proper relative thickness (as he calls it) remaining the same.

But, admitting that the view I have presented of the plaintiff’s title and specification is erroneous, I still think that the plaintiff has not been anticipated by Dobbs. The notes of the evidence at the trial, the summing up, and the verdict of the jury, are all part of the case ; and I now entirely agree with my brothers Williams and Willes, in what they said in the Exchequer Chamber, that a patent and specification which are worthless and produce nothing, cannot be considered as disclosing or anticipating any thing, so as to be any impediment to a subsequent real practical discovery ; and I cannot agree with my brother Bramwell (from whom I differ rarely, and always with great hesitation and reluctance), “ that no finding of the jury is important.” It may be, that had not the evidence and the finding been parts of the matter before us, we should be justified in finding, and indeed possibly called upon to find, that Dobbs’s patent and specification anticipated Betts in some matter claimed by Betts ; but if the fact be that Dobbs’s supposed invention has never been successfully practised, and never has produced any useful result, then in my opinion it must be treated as a mere suggestion, and nothing else, and it no more

invalidates Betts’s patent than Bramah’s patent for the hydraulic press would have been invalidated by the publication in books of philosophy of the hydrostatic paradox on which the invention was founded. Betts, in his specification, directs the metals separately to be rolled and laminated before that operation is performed upon them jointly. Whether it be to that

or to the proportions (which are stated to be "the proper relative proportions") success is due, matters not. Betts's process has succeeded, Dobbs's failed altogether, at least there is no evidence of its success; and, with the knowledge of that fact, as substantially found by the jury, I agree with what fell from my brothers Williams and Willes in the Court below.

With respect to the two questions your Lordships have put to the Judges, I am of opinion, first, that if Dobbs's specification is a good one, and entitled him to claim exclusively every proportion of lead and tin, then his claim includes Betts's, which is one definite proportion out of an indefinite number which may be suggested. But inasmuch as it is quite clear that some proportions of tin would give too little tin to be useful, and some would give too much tin to be economical, and there is no information given where economy begins and where utility ends, I much doubt whether so vague and general a specification is a compliance with the condition of the patent; and I strongly suspect, that if its success had ever occasioned it to be called in question, it would have been deemed a bad specification.

But the second question I now answer without any doubt in the negative. The specifications differ so much, that the practical result of each (by which their merit must ultimately be tried) can be ascertained only by the verdict of a jury.

\*THE LORD CHANCELLOR (LORD WESTBURY).—In this \*152 appeal the appellant, who was the plaintiff below, brought an action against the respondents for an infringement of his patent. The date of that patent was the 13th of January, 1849. One of the issues raised in the action was the alleged want of novelty in the invention of the plaintiff. The jury found a verdict for the plaintiff on all the issues. The defendants had leave reserved to them to enter a verdict for themselves on the issues founded on the first and second pleas.

The second plea was, that the plaintiff's invention, or a material part of it, was included in the specification of a patent granted to one Thomas Dobbs, in the year 1804.

My Lords, the question was very learnedly and ably argued before your Lordships, assisted by several of the learned Judges; and your Lordships thought fit to put to them two questions. Upon a reconsideration of those questions, I think it will appear that proba-

bly the first becomes immaterial, supposing the second question to be answered in the negative. All the Judges have concurred, for reasons which I think must be extremely satisfactory to your Lordships, in so answering the second question. There does not appear to have been quite the same unanimity of opinion with regard to the answer to be given to the first question; but in reality, the second question being answered in the negative, the first question can hardly be said to arise.

The answer of the learned Judges to the second question involves two conclusions which are extremely material to the patent law. One is this, that even if there is identity of language in two specifications, and (remembering that those specifications describe external objects) even if the language is *verbatim* the same, yet if there are terms of art found in the one specification, and  
 • 153 also • terms of art found in the other specification, it is impossible to predicate of the two with certainty that they describe the same identical external object, unless you ascertain that the terms of art used in the one have precisely the same signification and denote the same external objects at the date of the one specification as they do at the date of the other.

This is obvious; for, if we take two specifications, dated as the present are, one in the year 1804; and the other in the year 1849, even if the terms employed in the one were identical with the terms employed in the other, supposing that each of them contains a term of art, we will assume it to be a denomination of some engine, some instrument, some drug, or some chemical compound, it may well be that the thing denoted by that name in 1804 is altogether different from the thing denoted by that name in 1849. If it were necessary to enter into such a subject, I could give numerous examples, say from chemistry, of things that were denoted by one name in 1804, and which have retained the same denomination, but which, by improved processes of chemical manufactures, are at present perfectly different in their results, their qualities, and their effects from the things denoted by the same name forty or fifty years ago. It is clear, therefore, that if you compare two specifications, even if the language of both is the same, you cannot arrive at a certainty that they denote the same external object and the same external process, unless you enter into an inquiry and ascertain, as a fact, that the things signified by the noun substantive contained in the one specification, are precisely the same as

the things signified by the same noun substantive contained in the other. In all cases, therefore, where the two documents profess to describe an external thing, the identity of signification \* between the two documents containing the same descrip- \* 154 tion, must belong to the province of evidence and not to the province of construction.

I pass on to the next conclusion, which is involved in the answer of the learned Judges to your Lordships' question, and that conclusion, I think, is also of great importance to the law of patents, because it results from that opinion that an antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless you have ascertained that the antecedent specification discloses a practicable mode of producing the result which is the effect of the subsequent discovery. Here we attain at length to a certain undoubted and useful rule. For the law laid down, with regard to the interpretation of a subsequent specification, is equally applicable to the construction to be put upon publications or treatises previously given to the world, and which are frequently brought forward for the purpose of showing that the invention has been anticipated. The effect of this opinion I take to be this, if your Lordships shall affirm it, that a barren, general description, probably containing some suggested information, or involving some speculative theory, cannot be considered as anticipating, and as therefore avoiding, for want of novelty, a subsequent specification or invention which involves a practical truth, productive of beneficial results, unless you ascertain that the antecedent publication involves the same amount of practical and useful information.

Now it will be evident upon a comparison of these two specifications that the one was a mere general suggestion, while the other is a specific, definite, practical invention. It is possible that a suggestion, such as that contained in the one, may lead to the discovery of the invention contained in the other. But it is the latter alone which \* really does add to the amount of \* 155 useful knowledge ; it is the latter alone which, by its practical operation, confers a benefit upon mankind within the meaning of the patent law. In the present case, there was not only no evidence to show that that which was contained in Dobbs's specification was capable of practical operation, but in reality that conclusion was negatived by the verdict of the jury. Therefore, my Lords, concurring, as I entirely do, in the conclusions which have

been arrived at by the Judges in answer to the second question, it results as a necessary consequence that the decision of the Court of Queen's Bench, and of the Court of Exchequer Chamber, ought to be reversed, and that the rule *nisi* made absolute by the Court of Queen's Bench ought to be discharged. My Lords, I move your Lordships therefore to embody these conclusions in your present order.

LORD BROUGHAM. — My Lords, in the course of the argument I had expressed very considerable doubts on various parts of the case. Upon the whole, I consider those doubts as answered by the opinions of the learned Judges; and I agree with my noble and learned friend's proposition.

LORD CRANWORTH. — The only question in this case is, whether the plaintiff's invention was new. The jury found that it was. He is, therefore, entitled to judgment in his favour, unless, as a matter of law, the jurors could not, on the evidence, lawfully come to the conclusion at which they arrived; in other words, unless there was evidence before them which made it their duty, as a matter of law, to find that the invention was not new.

\* 156 The argument for the respondents was, that the \* absence of novelty was established conclusively by the production of Dobbs's specification; that in the face of that specification, the jury could not find in favour of the plaintiff; and this was the opinion of the Court of Queen's Bench, and afterwards of the Exchequer Chamber. But I agree with the able opinions of the minority of the Judges in the Exchequer Chamber, and of the learned Judges whose assistance we had at the argument of this case, that the judgment below was wrong.

It may be true that two specifications may be so entirely identical that the Judge may be warranted in telling the jury, as matter of law, that they cannot find the second invention to be new, though that was not decided in *Bush v. Fox*,<sup>1</sup> for there the jury had found as matter of fact that the mode of working the two inventions was the same.

But here, not only are the two specifications not identical, but in the earlier of them there is no trace of that which constitutes the very essence of the plaintiff's invention, namely, the relative thickness of the tin and the lead, and the mode of rolling and

<sup>1</sup> 5 H. L. Cas. 707.

laminating each metal separately before they are placed together, and then made to cohere by being rolled and laminated jointly.

Dobbs's specification disclosed no more than his notion that tin and lead might, by means of pressure, be so combined as to form a new and useful material. But it gave no information as to how that object could be attained, and there was evidence to show that Dobbs had never been able, in working according to his specification, to succeed in making the metals unite. There was, therefore, an essential difference between the two specifications,

\* which fully warranted the jury in finding a verdict for \* 157 the plaintiff, as they did.

The case has been so fully and ably discussed in the opinions of the learned Judges, and commented on by my noble and learned friend on the Woolsack, that I shall content myself with simply saying that I concur in the motion that judgment be given for the plaintiff below, who is appellant here.

LORD WENSLEYDALE. — My Lords, the result of the very full and able opinion delivered by my Lord Chief Baron on the questions propounded by your Lordships, and of the written opinions of the consulted Judges, with which we have been supplied, is, that the unanimous judgment of the Court of Queen's Bench and the judgment of the majority of the Court of Exchequer Chamber ought to be reversed. I concur entirely in the propriety of this course. It appears to me, without entering into all the questions which have been discussed at the bar, and on most of which the learned Judges have delivered their opinions, that my noble and learned friends who have just addressed the House have put the case on a ground which is quite satisfactory, and it appears to me it is perfectly unanswerable. The jury having found that the plaintiff's invention was new, unless the production of Dobbs's specification, without any other evidence, conclusively showed that it was not, the patent must be good. Now, I am clearly of opinion that the mere production of Dobbs's patent, in which he makes public his notion that lead and tin might be usefully combined in a new material by mechanical pressure, without any statement or proof how that object could be attained and a practical result secured, is insufficient to show that he had made a prior discovery, \* which was in law an invention. If nothing was \* 158 set out in the plea but the plaintiff's specification and

Dobbs's prior patent and specification, it would, I think, be unquestionably bad. That of Dobbs is not a disclosure of an invention.

I agree entirely with Mr. Justice Williams and Mr. Justice Willes in their opinion given in this case in the Court of Exchequer Chamber, that the mere publication of a notion that a particular article might be made, without any information or means of knowledge communicated to the public, does not preclude a subsequent first inventor of those means from taking out a patent.

Very early in the argument it appeared to me that, without some evidence to show that Dobbs's patent is capable of a practical application, and would produce some useful effect, it was inoperative to affect Betts's invention and to render his patent invalid; and it is much to be regretted that this view of the case was not fully discussed at an earlier period.

The following order was afterwards entered on the Journals: —

It is ordered, that the said judgment or rule of the Court of Exchequer Chamber, of the 7th July, 1860, affirming the judgment of the Court of Queen's Bench, of 30th May, 1859, be, and the same is, hereby reversed, and that the judgment or rule of the Court of Queen's Bench, of 30th May, 1859, so far as it orders that the verdict obtained in the said Court be set aside, and a verdict entered for the defendants instead thereof, be also reversed.

Lords' Journals, 5th June, 1862.

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• FISHER v. BRIERLEY.

1863. February 20.

MARY FISHER and others, *Appellants*.

JAMES BRIERLEY and others, *Respondents*.

*Deed. Mortmain. Possession. Resulting Trust. Costs.*

A deed executed under the Statute 9 Geo. 2, c. 36 (the Mortmain Act), is sufficient if it is made to take effect so as to give a title to immediate possession of the land. Equity will thereon enforce the trustees' rights to all the profits of the land. It is not necessary that possession *de facto* should be had.

To defeat such a deed it must be distinctly shown that there was an antecedent agreement between the donor and the trustees that the deed should not take

effect upon execution, but should be deferred till the death of the donor, who should in the mean time retain the benefit of the property.

A small piece of land was granted by deed (duly executed and enrolled under the Statute of Mortmain) for a charitable purpose, which could only be carried into effect by funds being provided for the purpose. The deed itself was allowed to remain in the possession of the grantor, whose managing bailiff manured and mowed the land (as he did other land of the same kind belonging to the grantor, and either rented by himself or managed by him as bailiff), and the hay obtained from it was carried to the grantor's stables and there consumed. The funds necessary for carrying into effect the purpose of the deed were provided by the will of the grantor : —

*Held*, that these circumstances did not show the existence of a reservation or condition for the benefit of the grantor such as would avoid the deed.

There was no provision in the deed for appropriating in any way the produce of the land or the rent it might fetch during the interval between the date of the deed and the time when its provisions might be carried into effect : —

*Held*, that this did not constitute a resulting trust, so as to avoid the deed.

Costs were given, out of the residuary fund in Court, against such of the residuary legatees as had joined in the appeal.

THIS was an appeal against a decision of the Lords Justices, which had reversed a decree of the Master of the Rolls.

In the year 1851 Miss Mary Winfield Lambert, a lady of fortune, residing at Boarbank, in Cartmel, Lancashire, expressed to her then solicitor, Mr. Reveley, a wish to \*devise a piece \*160 of land for the purposes of building a church, a minister's residence, and a school-house. Mr. Reveley explained to her that her intention could only be carried into effect by a deed, by which she must completely give up the land for the purpose. She directed him to prepare such a deed, which was done, and on the 14th May, 1861, it was duly executed. The deed purported to convey to Brierley and others a piece of land of about two acres, "upon trust, to permit to be erected and built upon part thereof a church or chapel, for the worship of Almighty God, according to the rites and ceremonies of the United Church of England and Ireland, as by law established, with or without a cemetery to be annexed, and also a messuage or dwelling-house, with a yard, garden, and suitable offices, to be occupied therewith, for the residence of the minister who shall for the time being officiate in such church or chapel aforesaid, and also a school-house, with suitable offices, and with or without a play-ground, and with or without a residence for the mistress who shall teach therein, to be used for the education of the children of the labouring classes of the said town-



ship, and with full power for the person or persons who shall provide the funds for the erection of such church or chapel, and other buildings as aforesaid, to make such regulations respecting the use thereof for the aforesaid purposes respectively as he or they shall think proper."

This deed was duly enrolled under the provisions of the Mortmain Act.

Miss Lambert, by her will, dated 6th November, 1851, which recited this deed, bequeathed to Brierley and those three other persons 2500*l.* for building a church on the land, 1500*l.* for building a parsonage, 1000*l.* for building and furnishing a school \*161 there, 1500*l.* for a fund \* to raise a salary for the schoolmistress, and 500*l.* as a fund for supplying books to the school. She also gave 5000*l.* to the Bishop of Chester, as a fund to provide a stipend for the clergyman. By a codicil, dated 12th November, 1857, she constituted Mary Fisher and other persons her residuary legatees.

The testatrix died in November, 1857. At the date of the deed two of the farms she possessed at Cartmel were occupied by Robert Wilcock, as her tenant, and one farm was in her own occupation, and was managed by him as her bailiff. He resided at Boarbank, and was her confidential adviser in the management of her property. The land comprised in the deed had been awarded to her under an Enclosure Act, and was separated from the other farms. The deed itself was left in her possession, and so continued to her death, and the evidence went to show that Wilcock treated the piece of land like the rest of Miss Lambert's property, whether in his own occupation or under his management. It was manured with dung from her stables, it was mowed by men in her service, and the hay taken from it was carried to her stables. It was in evidence, that shortly after the execution of the deed Miss Lambert said to Brierley, "I have given it" (meaning this piece of land), "and I will have nothing more to do with it; but as Wilcock is always complaining of shortness of grass on his farms, you had better let him have it"; and the two trustees positively denied any agreement for allowing the land to remain in Miss Lambert's possession or control. Wilcock died in August, 1857 (nearly three months before Miss Lambert), much indebted to her, and insolvent.

On the 6th December, 1858, Mrs. Fisher and the other residuary

legatees filed their bill against Brierley, and all other necessary parties, including the Bishop of Chester \* and the \* 162 Attorney-General, which bill, after setting forth the deed and the will, charged that the land conveyed by the deed remained in the testatrix's possession up to the time of her death, and that the deed was not executed *bond fide*, but was a contrivance to evade the Statute of Mortmain, and prayed that the bill might be established, and the trusts thereof declared, so far as the same were not illegal and void; and that the deed, and the legacies in the will consequent thereon, might be declared void, as contrary to the said statute, and for accounts and general relief.

Evidence was taken to the effect already stated.

The cause was heard before the Master of the Rolls, who, on the 16th January, 1860, granted the prayer of the bill. The Lords Justices, on May 4, 1860, reversed his Honour's decree.<sup>1</sup> This appeal was then brought.

*Mr. Rolt* and *Mr. Speed*, for the appellants. — In order to make a deed like this valid, it must be without any condition or reservation whatever for the benefit of the grantor, and must give to the trustees a present right of possession, *Doe d. Thompson v. Pitcher*.<sup>2</sup> If there is any secret trust for the grantor, it is void, *The Attorney-General v. Poulden*; <sup>3</sup> *Russell v. Jackson*.<sup>4</sup> Those conditions have not been complied with here, nor were they intended to be so. The professed object of the testatrix was to build a church, a school, and residences for the minister and schoolmistress. No present provision was made for carrying those objects into effect beyond merely giving the land. The funds to erect the buildings were not provided; they were to be supplied by legacies given by her will. This was the \* tacit understanding of \* 163 the parties. That shows that the intention was that the buildings should not be erected till after her death. The trust of the deed itself was only to permit the erection of these buildings. There was, therefore, no present right of possession given by the deed; and the evidence shows that in fact the deed was kept in the testatrix's possession till her death, that the trustees never interfered with the property, and that her bailiff managed it and consumed the produce of the land on her premises. There can,

<sup>1</sup> 1 De G., F. & J. 643.

<sup>2</sup> 3 Maule & S. 407.

<sup>3</sup> 8 Sim. 472.

<sup>4</sup> 10 Hare, 204.

therefore, be no doubt that there was a secret trust for her. This may be proved by the conduct of the parties as well as by any declarations made by them, *Way v. East*,<sup>1</sup> and will render the deed invalid.

This was a mere scheme to evade the provisions of the 9 Geo. 2, c. 36. The object of that Act was correctly stated in *The Attorney-General v. Weymouth*,<sup>2</sup> was mistaken in *Edwards v. Hall*,<sup>3</sup> and *Alexander v. Brame*,<sup>4</sup> and was authoritatively established by this House, in accordance with Lord Hardwicke's opinion, in *Jeffries v. Alexander*.<sup>5</sup> That object was to prevent dying persons from giving away from their heirs, under pretence of founding charities, property which they had never been willing to part from during their own lives. A scheme of this kind would utterly defeat that object.

The deed here contains a resulting trust in favour of the grantor. A piece of land appears to be given to trustees for a specific object; but there are no means provided for carrying that object into effect. The land is capable of producing income or rent; no provision is made for the employment of that income in the \* 164 interval \* between the gift of the land and the furnishing of the means by which the professed object of the deed is to be carried into execution. There is, therefore, a resulting trust of that income for the benefit of the grantor, and the deed is void, *Limbrey v. Gurr*.<sup>6</sup>

Finally, the 42 Geo. 3, c. 108, and the 4 & 5 Vict. c. 38, have no effect in giving validity to this deed.<sup>7</sup>

*Mr. Chapman* and *Mr. Eddis* were for the respondents.

*The Attorney-General* (*Sir W. Atherton*), *The Solicitor-General* (*Sir R. Palmer*), and *Mr. Wickens* appeared for the Crown.

At the close of the appellant's argument —

THE LORD CHANCELLOR (LORD WESTBURY) said: My Lords, this is an appeal against a judgment of the Lords Justices upon the subject of a gift in charity. The appellants say that a deed of

<sup>1</sup> 2 Drewry, 44.

<sup>2</sup> Ambl. 20.

<sup>3</sup> 6 De G., M. & G. 74.

<sup>7</sup> The argument on this point is omitted, as no notice of the point was taken in the judgment.

<sup>4</sup> 7 De G., M. & G. 525.

<sup>5</sup> 8 H. L. Cas. 594.

<sup>6</sup> Madd. & G. 151.

gift of a piece of land for the purpose of erecting thereon a church or chapel and a school-house ought to be treated as invalid, on the ground that the deed of gift is one which falls within the provisions of the Statute of Mortmain, and is in reality a contravention of the provisions of that statute. Also, that there was an agreement between the donor and the trustees of the deed, allowing the donor to retain possession of the land which professed to be the subject of the gift; and, further, that there were in the deed of gift words which admitted the construction of there being a resulting trust in favour of the donor, and that, consequently, \*the gift was one which cannot be protected by the \*165 statute.

I shall not, for the moment, stop to inquire whether the alleged agreement between the donor and the trustees would come within the meaning of the words of the first section of the statute. On examining the evidence in the case, I think that there is no reasonable ground for coming to the conclusion that there was such an agreement as the appellants allege. The appellants have not given any direct evidence of the existence of such an agreement; but they bring forward evidence which is intended to show that that agreement must be taken as a necessary inference of fact.

It is material to observe, in the first place, that there are two other parties to this transaction, one of them being a trustee and solicitor to the donor, by whom the whole conduct of the matter was managed, and the other also a trustee, and a clergyman; and they both join in distinctly affirming, on oath, that there was no such agreement between them and the testatrix, as is suggested by the appellants. It would, therefore, require very strong circumstances indeed to make me arrive at a conclusion directly contradicted by such positive evidence. But, even if there had not been such a contradiction, I should be of opinion that the circumstances do not warrant a presumption of that kind.

It appears that the testatrix was at first desirous of making a will, and of leaving this property by will for this charitable purpose. She was told by her solicitor that that would not be sufficient; that the law did not permit her to do it by will, so far as the appropriation of a piece of land to charity was concerned. She was, therefore, advised to make a conveyance of this piece of land by deed. It appears that the solicitor who was in-

\*166   structed \* to carry her intentions into effect, thought that an interest in the property for life might be reserved by the donor; but when the papers were sent up to London advice was given which corrected this error. It was said that there could be no life interest reserved to the donor without avoiding the whole transaction. The result was that a deed was prepared which, so far as the expressions go, is in perfect conformity with the statute. There was a conveyance of an absolute kind of the piece of land on which the church and school-house were to be erected; it was a small piece of land of about two or three acres.

It is quite clear, therefore, that proper knowledge was possessed by the solicitor, and was acted upon by him in getting the deed prepared. He states distinctly that he informed the donor that the gift must be an absolute gift of the property — that she must part with it completely. It would be an unreasonable thing to suppose, after all this, that, the parties having been so instructed, have secretly, and for the sake of a matter so trifling as this, proceeded in such a way as to occasion the deed to be a failure for the object for which it was intended, by reserving a life interest to the donor. It is from these facts that your Lordships are asked to draw this conclusion, that a piece of land not worth more than 3*l.* a year was to be reserved to the possession of the donor for her life, and that, notwithstanding all the reasons for taking the right course to make a valid gift, the persons employed nevertheless intended, in order to retain for the donor the mere value of this small piece of land, to do that which, through the operation of the statute, would defeat her object. I think that a more improbable conclusion could scarcely be presented for your adoption.

What are the facts which are adduced to justify it?

\*167   \* The object of the conveyance was to have a church and a school-house erected upon the land. In the mean time, and until that could be done, it was not likely that the trustees would be able to get a tenant for this piece of land; nor would it be in their power to let the land to any advantage. Under those circumstances it was occasionally used for the benefit of the donor. The grass growing on it was cut, and the trustees allowed it to be taken into her stables; but there is nothing in that to warrant your Lordships arriving at the conclusion that the trustees had parted with the possession of the land which had been absolutely vested in them by the terms of the deed. Nor is it easy

to believe, that what was subsequently done with the land was the result of an antecedent agreement, that it should be held by the donor during her life for her own benefit.

But your Lordships are asked to come to the conclusion that there was such an agreement, because, in order to carry the charitable object into effect it was necessary that a sum of money should be provided, which was only given by the will; but that is a proceeding which the Statute of Mortmain allows. It was with a view to such a disposition that the conveyance of the land was made. That, therefore, would not defeat the validity of the transaction. If the land was *bond fide* conveyed to trustees, so that it might be used by them in the lifetime of the donor, the validity of that conveyance cannot be affected by the fact that she afterwards, by her will, left a sum of money to carry the object of that conveyance into effect.

Then, with regard to the alleged resulting trust, there is no weight in the argument founded upon that. The words of the statute upon that subject are clear—"unless the gift be made to take effect in possession, for the \*charitable use \*168 intended, and be without any power of reservation and trust for the benefit of the donor or grantor." The deed, therefore, must be so expressed that the conveyance shall take effect immediately in possession. It is not necessary that possession *de facto* shall be had. It is a sufficient compliance with the statute that the deed is made to take effect, so as to give a title to possession. In *Doe v. Pitcher*,<sup>1</sup> Lord Ellenborough says, "As to the objection that the deed did not take effect in possession, the statute only requires that it should be made to take effect in possession. And it is so made." And so it is here. The whole property here vested in the trustees, and therefore the argument that some time would be required in order to raise the money which was to carry the charitable purpose of the deed into effect does not affect the validity of the deed. The deed would be regarded by equity as immediately vesting, so as to convey to the trustees the right to enter into immediate possession of the land and of the profits. It was a present gift, and the trustees of the charity would have a perfect right to possess every shilling of those profits, until the object of the deed could be carried into effect by building the church and school-house, and the Court of

<sup>1</sup> 3 M. & S. 410.

Chancery would take care that no part of those profits should be applied to any other purpose than that mentioned in the deed.

As to the law, I should be of opinion that it would be no ground for avoiding the operation of the deed, unless it was clearly and distinctly shown that there had been an agreement made antecedently to the deed between the donor and the trustees,

that the deed should not take effect at the moment of its \*169 execution, but that its operation \* should be deferred until the death of the donor, who should in the mean time retain the benefit of the property. But I need not go into the law upon that subject, for there is here no evidence of any such agreement. There is nothing to impede the operation of the instrument; nothing to disjoin the possession of the estate from the trustees.

I am, therefore, of opinion, that there is no ground whatever on which the decision of the Lords Justices may be impugned; and I advise your Lordships to affirm that judgment, and to direct that the appeal be dismissed with costs.

LORD WENSLEYDALE. — My Lords, I am entirely of the same opinion. The sole question in the present case seems to be, whether the Statute of Mortmain has been complied with or not. I need not enter into the question as to the supposed defect being supplied by the Church Building Acts. The Statute of Mortmain requires a deed to be made to take effect immediately for a charitable purpose, and without any agreement for retaining any benefit for the advantage of the grantor. The only question raised is, whether the donor retained the benefit of the land for her life. I think the evidence is sufficient to show that she did not; there is none to lead to the conclusion that she did. It is not enough to show that she was permitted to remain in possession for a part of the time, when the land could not be used for the benefit of the charity, or to show that she was in possession of the title deeds. She might naturally wish to preserve the deeds, in order to prevent the possibility of their loss; but the deeds were of no use to her, so far as legal possession of the land was concerned. Nor did it give \*170 her any authority over the land. Then, \* does the possession of the land on her part lead to the conclusion that there was an agreement or understanding between the two parties that she should retain it till the time of her death? I think there is no evidence that there was such an agreement or understanding;

if there had been it would have brought the case within the Mortmain Act; but there is no proof of there being such an agreement; and although the circumstance of her being in possession of the land in itself is something, that is met by the oath of the trustees.

I think therefore that the view taken of this case by the Lords Justices was more correct than that which was taken by the Master of the Rolls. The Lords Justices have found (if I may say so) a true verdict upon the evidence, and I think their judgment ought to be affirmed. With respect to the objection that there was a resulting trust, I think that has been entirely answered by the Lord Chancellor.

LORD CHELMSFORD concurred.

The following order was entered on the journals: "That the said decree of the Lords Justices be affirmed, and that the appeal be dismissed; and that the costs incurred by the said appellants, and by the said respondents, her Majesty's Attorney-General, Brierley, &c. [the trustees], and the Bishop of Chester, in respect of the appeal, be paid out of such part of the fund in Court as consists of the shares of the residuary legatees, with the exception of the shares of J. Proctor and E. Lambert" [two of the residuary legatees who did not join in the appeal].

Lords' Journals, 20th February, 1863.

1862. April 7, 8; June 5.

HENRY W. BYNG and others, *Appellants*.

ALFRED M. BYNG and HENRY WEBB, *Respondents*.<sup>1</sup>

*Will. "Children," Word of Purchase or Limitation. "Heirlooms."*

When there is a devise of land to "A. B. and his children," and at the time of the devise he has no child, the word "children" is *primâ facie* a word of limitation, and the first taker shall have an estate tail; if he has children, it is

<sup>1</sup> *Watkins v. Frederick*, 11 H. L. Cas. 362; *Coltsmann v. Coltsmann*, Law Rep. 3 H. L. 127.



*prima facie* a word of purchase, and gives a joint estate to him and his children as purchasers. But either of these constructions may be defeated by the plain intention of the testator to be collected from the whole of the will.

A testatrix, in a holograph will, gave "in trust to my executors for my niece M. A. B. and her children, all my Quendon Hall estates in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, India cabinet, striking watch, and my diamond ear-rings as *heirlooms* with my estate." The niece died before the testatrix, leaving several children:—

*Held*, affirming the decree of the Court below, that "children" was a word of flexible meaning, and that on the whole context of this will it must be read as a word of limitation, so that the eldest son of the niece took an estate tail in the devised property.

*Seem*, that "heirlooms" here meant something which, though not in its own nature heritable, is to have a heritable character impressed upon it.

*Wild's Case*, 6 Co. Rep. 17, and *Buffar v. Bradford*, 2 Atk. 220, explained.

Anne Cranmer, widow, by a holograph will, dated in October, 1854, after other devises and bequests, gave "in trust to my executors for my niece, Mary Anne Byng, and her children, all my Quendon Hall estate in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, the India cabinet in drawing-room, and striking watch, and my diamond ear-rings and pins, as *heirlooms* with my estate." She appointed the respondent, Henry Webb,

\*172 \*and another person, her executors. She gave "the residue and remainder of my real estate, of what nature or kind soever, not having, or before by me been given or bequeathed, unto my niece, Mary Anne Byng, her heirs and assigns for ever."

The testatrix died in June, 1853. The niece, Mary Anne Byng, had died previously, but left eight children (some born before, some after, the date of the will) her surviving, the respondent, Alfred Molyneux Byng, being the eldest of them.

In July, 1853, Henry Webb, the executor, filed his bill in Chancery, praying for the directions of the Court in carrying the will into effect. After the usual inquiries had been ordered, and the chief clerk's certificate made, the cause came on for further directions 9th June, 1856, when Vice-Chancellor Wood pronounced a decree, declaring that the Quendon Hall estates were devised to Mary Anne Byng in fee-tail general, and that Alfred Molyneux Byng, her eldest son, was entitled to an estate tail in the said

estates, as if the niece, Mary Anne Byng, had died immediately after the death of the testatrix.<sup>1</sup> This decree was affirmed by the Lords Justices, 25th November, 1856. The present appeal was then brought.

*Mr. Rolt* and *Mr. G. L. Russell*, for the appellants. — The word “children” is properly a word of purchase, and not of limitation. That is its ordinary construction, and the residuary clause shows that such was the construction which this testatrix intended to put on it. There is nothing in this will to raise the argument that it ought to be differently construed, for even the name and arms clause applies to all the children, and shows that all the children were entitled, if they complied with the condition \*to take \*173 a benefit. That clause does not apply to the niece alone, so that it is clear that she was not intended to take the whole property, with a limitation to her heirs of any class; but it applies to her and to the children equally. If the niece had survived the testatrix, and refused to take the name and arms of Cranmer, that would not have affected the rights of the children. The clause as to the picture and the heirlooms does not show that the whole estate was to go in a lump, for heirlooms may be jointly enjoyed. That clause either has no effect, or it merely gives the picture and other things to the tenant for life during the tenancy, and afterwards to the tenants in remainder. Even though it may be held that the niece takes the whole in the first instance, she only takes for life, and the children take after her as purchasers. They cited *Wild's Case*,<sup>2</sup> *Buffar v. Bradford*,<sup>3</sup> *Heron v. Stokes*,<sup>4</sup> *Oates v. Jackson*,<sup>5</sup> *Jeffery v. Honeywood*,<sup>6</sup> *Kennedy v. Sedgwick*,<sup>7</sup> *Ex parte Hooper*,<sup>8</sup> *Broadhurst v. Morris*,<sup>9</sup> *Tyrone v. Waterford*,<sup>10</sup> *Lees v. Mosley*,<sup>11</sup> *Vaughan v. Headfort*.<sup>12</sup>

*Sir H. Cairns* and *Mr. Markham Giffard* (*Mr. Karlake* was with them), for the respondents. — The rule in *Wild's Case*<sup>2</sup> does not apply where a contrary intention is manifested by the proper

<sup>1</sup> 2 Kay & J. 669.

<sup>2</sup> 2 Atk. 220.

<sup>3</sup> 6 Rep. 17.

<sup>4</sup> 2 Drury & War. 89; S. C. on Appeal, 12 Clark & F. 161.

<sup>5</sup> 2 Str. 1172.

<sup>6</sup> 2 B. & Ad. 1.

<sup>7</sup> 4 Madd. 398.

<sup>8</sup> 1 De G., F. & J. 613.

<sup>9</sup> 3 Kay & J. 540.

<sup>10</sup> 1 Younge & C. Exch. 589.

<sup>11</sup> 1 Drewry, 264.

<sup>12</sup> 10 Sim. 639.

construction of the whole will. The words of this will show an intention to create an estate tail with reference to the Quendon Hall estate, and that intention, strongly manifested by the name \* 174 and arms clause, and by the gift \* of the heirlooms, would be altogether defeated by a construction of the word "children" as a word of purchase. It is here a word of limitation; and as it is a word of flexible meaning, it must here receive that construction, because such is clearly the intention of the testatrix. They commented on the cases already cited, and mentioned in addition *Wood v. Baron*,<sup>1</sup> *Doe v. Bradley*,<sup>2</sup> *Doe v. Mulgrave*,<sup>3</sup> *Trash v. Wood*,<sup>4</sup> and *Seale v. Barter*.<sup>5</sup> In this last case Lord Alvanley observes<sup>6</sup> on the difference between the report of *Wild's Case* in Coke's Reports, and in Moore,<sup>7</sup> and in the same judgment he quotes the opinion of Mr. Baron Perrot, in *Perrin v. Blake*, upon the fallacy of assuming that a testator always "knows the different privileges annexed to the several estates of tenant for life or tenant in tail," observing that the true question is, what was the intention of the testator? That intention is here shown by the name and arms clause, and by the gift of the picture, &c. "as heirlooms," which were meant to be held by the one person who held the estate, and not to be scattered among all the members of the niece's family, whereby they would lose the character which alone entitled them to the name of heirlooms.

*Mr. Rolt* replied.

1862. June 5.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this appeal depends upon the construction of a devise contained in the will of Mary Anne Byng, dated in the month of October, 1844. In considering this case, I have been reminded of the observation of Lord Coke, "that wills and the construction of them, do \* 175 more \* perplex a man than any other matter, and to make a certain construction of them exceedeth *jurisprudentium artem*." But after some fluctuation of opinion, I have at length arrived at a conclusion satisfactory to myself, that the decision of the Court below ought to be affirmed.

<sup>1</sup> 1 East, 259.

<sup>2</sup> 16 East, 399.

<sup>3</sup> 5 T. R. 320.

<sup>7</sup> Nom. *Richardson v. Yardley*, Moore, 397.

<sup>4</sup> 4 Mylne & C. 324.

<sup>5</sup> 2 Bos. & P. 485.

<sup>6</sup> 2 Bos. & P. 492.

My Lords, the portion of the will upon which this question turns may be divided into two parts, one which I will denominate the gift of the principal subject, that is of the Quendon Hall estate, and the other the gift of the accessory, that is to say, of certain articles of personalty, which it is directed shall go along with and accompany the principal subject.

The gift of the principal subject, the Quendon Hall estate, is to the testatrix's niece, Mary Anne Byng and her children. I forbear for the moment from considering the effect of these words of gift, passing on to consider, in the first place, what is the interpretation to be put upon the words of donation of the accessory, which are in immediate connection, forming part of the same sentence, with the words of gift of the principal subject.

The accessory is given in the following words: "With my mansion house, furniture, plate, books, linen, and Archbishop Cranmer's portrait by Holbein, the Indian cabinet in drawing-room, and striking watch, and diamond ear-rings and pins, as heirlooms with my estate." From the words which I have read, an intention must be inferred that these articles shall be enjoyed collectively, and not in a divided or separate manner. They are to go "as heirlooms with my estate." Now, according to the popular and familiar sense of the term "heirlooms," it indicates things directed to descend by way of inheritance. I collect, therefore, from these words of gift of the heirlooms, the intention that they are to be enjoyed together, collectively, and therefore, of necessity, in a form of individual \* enjoyment, and that such enjoy- \* 176 ment is to be had together "with the estate." If, therefore, there be a clear description of the manner in which the accessory is to be held and enjoyed, and the accessory is an inseparable incident to the principal, the light derived from the direction given with regard to the accessory may with propriety be used for the purpose of clearing the testatrix's intention with regard to the enjoyment of the principal. It would be manifestly impossible and repugnant to the intention of the testatrix that the accessory should be enjoyed in one way and the principal in another.

With these conclusions, I recur to the consideration of the words of gift of the principal. This gift is contained in a very few words. The testatrix gives the Quendon Hall estates to her niece, Mary Anne Byng, and her children.

At the time of the gift, and also at the death of the testatrix, there were children of Mary Anne Byng. It is contended by the appellants that the rule of law will not admit of qualification or control, which it is said gives to the children, if there be children existing at the date of the will and the death of the testatrix, a right to take as purchasers. The rule of construction in *Wild's Case* is of course subject to the general rule, that the primary signification of the word "children" may be controlled by evidence of a different meaning to be collected from the rest of the instrument. You must give to words their ordinary meaning, unless that meaning leads to absurdity or repugnancy, or contradicts the rest of the instrument. Then, supposing that to be so, the question would still recur, whether the intention which I have collected with regard to the gift of the heirlooms, and the manner in which they are to be enjoyed, is not an intention so plainly indicated by the testatrix in the direct \* words of gift, as would involve you in repugnancy and contradiction, if you gave to the words of gift of the principal subject a meaning that would compel the principal subject to be enjoyed in a manner altogether different from the mode of enjoyment indicated and directed with regard to the accessory.

Then, my Lords, which of these is to yield to the other? I find that the word "children" has been established by decisions to be a word of flexible meaning; it is so treated in *Wild's Case*; for there the meaning to be attributed to the word is made to depend upon extrinsic circumstances existing at the time of the devise. If there be children in existence, it is held primarily to indicate those children. If there be no children in existence, then it is held to quit its character of a word of purchase, and to become a word of limitation. But the operation upon the word by the effect of external circumstances may be equally produced by the effect of other language contained in the instrument. And therefore, my Lords, after much hesitation and deliberation, I have arrived at the conclusion which I have already suggested, that the manner of enjoyment indicated with regard to the heirlooms controls the ordinary and primary signification of the word "children," even when there are persons in existence to answer that denomination; and that the word "children" must be considered as a word of limitation, and not as a word of purchase, and that that is the best mode of carrying into effect the intention of the

testatrix, which is to be collected entirely from the words which she has used, without any reference to the moral considerations derivable from the nature of the gift. I think, therefore, that the word "children" here is to be interpreted as a word of limitation, and not as a word of \*purchase, and that, \*178 consequently, the decision of the Court below ought to be affirmed.

My Lords, I regret that I have occupied your Lordships so long, because I have had the benefit of reading the opinions which my two noble and learned friends have communicated to me; and I trust that my noble and learned friends will read those opinions to your Lordships, which will, I think, more abundantly satisfy your minds of the accuracy of the conclusion at which I have arrived.

LORD CRANWORTH. — My Lords, it must be taken as established by the rules of construction laid down in *Wild's Case*, that where there is a devise of land to a man and his children, and he has at the time of the devise no child, then *prima facie* the word "children" shall be taken to be a word of limitation, and the first taker shall have an estate tail; but, on the other hand, if the first taker has children at the time of the devise, then the will shall *prima facie* be construed as giving a joint estate to the first taker and the children as purchasers.

I have qualified the rule as stated by Lord Coke, by introducing the words "*prima facie*," because he certainly did not mean to state the rule as one which must take effect where a contrary intention was apparent; and it is clear that in acting on the rule in both its branches, the Courts have always considered themselves at liberty to disregard it where an adherence to it would defeat the intention of the testator, as collected from other passages in the will.

Thus, in *Buffar v. Bradford*,<sup>1</sup> where the devise was \*to \*179 the niece of the testator and the children born of her body, and the niece had no child at the time when the will was made, but afterwards died in the lifetime of the testator, leaving a daughter, an only child, Lord Hardwicke held that this child took as a joint devisee with her mother, and so by survivorship was entitled to the whole. The ground on which Lord Hardwicke came

<sup>1</sup> 2 Atk. 220.

to this conclusion was not, as was argued at the bar, that he construed the will according to what was the state of the family at the death, and not according to what it was when the will was made, but that it was apparent on the face of the will that the testator meant all children of the niece born before the death or marriage of his sister, to share jointly with their mother. The devise was, in the first place, to his sister during her widowhood, and, subject thereto, he directed his estates, real and personal, to be divided into eight equal parts, and, after disposing of four of them, he gave the remaining four parts "to my niece Buffar and the children born of her body." If the will had stopped there, it would have been impossible, consistently with *Wild's Case*, to hold, that after-born children should take as purchasers jointly with their mother; the devise would have lapsed by the death of the niece in the lifetime of the devisor. But the will went on to say, that if any part of the estate should be too highly valued (referring obviously to his direction that it should be divided into eight equal parts), "then such part shall, when the time of possession comes, go to Mrs. Buffar and her children, because they will have then four of the eight parts." This provision in the will made it clear that the testator intended his niece, and any children she might have when the time of possession should come, i. e. on the death or marriage of his sister, to take jointly. And so Lord \* 180 Hardwicke \* thought, for he says expressly, "It is the time of possession in the present case which takes it out of the reasoning in *Wild's Case*, for here Mrs. Buffar and her children are to have four eighths, and are to take at the same time as joint tenants." This is a conclusion founded not on the notion that there could be a varying interpretation of the will according to circumstances which might happen after it was made, but on its evident meaning when it was made; and I have commented on the case chiefly for the purpose of showing what were the real grounds of Lord Hardwicke's decision.

This was a case in which the first branch of the rule in *Wild's Case* was made to bend to an intention collected from other parts of the will; but the same principle must apply to the other branch of it, as was in fact done in the two cases in East's Reports referred to by Sir Hugh Cairns, namely, *Wood v. Baron*,<sup>1</sup> and *Doe v. Bradley*.<sup>2</sup>

<sup>1</sup> 1 East, 259.

<sup>2</sup> 16 East, 399.

In the case now before the House, the devise is, "in trust for my niece Mary Anne Byng, and her children, all my Quendon Hall estates in Essex." If the will had stopped there, the niece and her children would, on the authority of *Wild's Case*, have taken as joint tenants. The Vice-Chancellor and the Lords Justices have held, however, that, looking to the context, there is sufficient to show that this was not the intention of the testatrix; that she meant to give to her niece an estate tail, using the words "and her children" as words of limitation. I have arrived at a conclusion in conformity to that which was adopted in the Courts below.

The will, it must be observed, is a holograph will, written apparently without professional assistance. At the time of its date, in October, 1844, the niece had four \*children, i. e. \*181 three sons, born respectively in 1840, 1841, 1842, and one daughter, born in 1844; the youngest of the three sons died in 1849. After the date of the will, the niece gave birth to five other children, and died in the lifetime of the testatrix, who died in June, 1853. All the children, except the son who died in 1849, are still alive. The gross rental of the Quendon Hall estates is a little above 1500*l*.

There are two passages in the will which bring me to the conclusion that the testatrix could not have contemplated a joint tenancy among the niece and her children. The first is the clause which immediately follows the gift of the Quendon Hall estates, to which I have already referred. The testatrix adds, "provided she takes the name of Cranmer, and arms, and her children." It seems to me to the last degree improbable that the testatrix could have intended that the estate should be divided into as many shares as there should happen at her death to be children of her niece, and that she could intend they should all take the name and arms of Cranmer. The direction to take the name and arms is significant of a wish to found or establish a family which shall enjoy the family estate—a wish hardly to be reconciled with the intention that the property shall be divided among the parent and as many children, born or to be born, as may happen to survive the testatrix. The direction is one for which it is difficult to imagine a motive, if the estate (not in this case a large one) is to be split into a great number of small properties, insufficient to confer importance on, or to derive importance from, the name and arms with which they are to be associated. For these reasons, I think that the di-



rection to take the name and arms tends strongly to show  
 \*182 an intention to \* keep the estates in a single line of enjoyment, and not to divide them among an indefinite number of objects.

The rest of the clause in question, however, suggests arguments in favour of the construction adopted by the Court below of much greater weight. The testatrix, after giving the estates to the niece and her children, with the name and arms clause, proceeds thus: "With my mansion house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, the India cabinet in drawing-room, and striking watch, and my diamond ear-rings and pins, as heirlooms with my estate." I think it impossible not to infer from this passage that the testatrix considered herself to be giving these chattels in such a way as that they would in the ordinary course of events be held and enjoyed by a single owner from time to time. It is impossible to impute to her an intention that Holbein's portrait of the Archbishop should not remain in the mansion house, that it should become the joint property of several, and so, practically, be incapable of enjoyment, as forming part of or going with the estate.

The expression, it will be observed, is as "heirlooms with my estate," in the singular number, not estates, as in the former part of the sentence. This is not altogether immaterial; it tends to confirm the notion that she considered all which she had devised as forming one estate, i. e., as I interpret it, to be always enjoyed by one proprietor at a time. It is true that this object would necessarily be defeated in case the estate should descend to coparceners; but this, it may well be supposed, was a contingency not contemplated by the testatrix; she would not be likely to look far into futurity. When she made her will the niece had three

\*183 \*sons, and she probably never looked beyond them. I cannot think that the argument drawn from the improbability of her having intended to give these favoured chattels to be held in joint tenancy is weakened by the circumstance that a state of things might arise when such a contingency was inevitable.

I may add, that the very word "heirlooms" seems to involve in it the principle of descent. It was said at the bar the word "looms" was only a corruption or abbreviation of "limbs"; I find that Johnson and Webster both give a different, and, as I be-

lieve, a more correct explanation of it. They say it is an old Anglo-Saxon word, signifying goods or chattels. According to either derivation, the word "heirlooms" must mean something which, though not by its own nature heritable, is to have a heritable character impressed upon it; an interpretation hardly to be reconciled with an absolute gift to several persons as joint tenants.

On these grounds, I am prepared to concur with the decision below. But I must not conclude without adverting to an observation which fell from the Lord Chancellor in the course of the argument at the bar, entitled, I think, to very great weight. At the date of the will, the niece, as I have already stated, had three sons, the eldest four years old, the youngest only two; part of the property of the testatrix consisted of two advowsons, and she expressly provided in her will, that if the second son should enter into holy orders, he should have the two livings, meaning probably only that he should be entitled to be presented to them, or, if he should decline, then she gives a similar right to the third son. This is surely very strong to show that she considered that the eldest son would be provided for by succeeding to the family estate under her will. It is, to be \* sure, possible that the testatrix might \* 184 have conceived some dislike to the eldest son, though he was a child of only four years of age, or she might have had other reasons for excluding him. It is, however, well worthy of remark, that the provision is just what was to be expected if the construction which gives the niece an estate tail is adopted. It is, or at all events it seems, unreasonable on the hypothesis adopted by the appellants.

On all these grounds I am prepared to affirm the decrees of the Vice-Chancellor and Lords Justices.

LORD KINGSDOWN. — My Lords, the opinions which have been already expressed by your Lordships are so satisfactory, that it is hardly worth while for me to trouble you with mine; but at the same time, as this is a question of some nicety, I feel it proper to do so.

The question in this case depends upon the meaning to be attributed to the word "children."

There is no doubt that in its primary sense it is to be read as a word of purchase, and to be confined to issue in the first degree.

But it is equally clear that it is a flexible term, which may, by the context of the will in which it is found, be converted into a word of limitation, and interpreted into "heirs of the body." What context is sufficient to give this interpretation it is impossible to define, further than by saying that it must be such as to satisfy the Judge who is to construe the instrument, that the person who used the term intended it, not in its primary, but in its secondary sense.

In order to determine whether such an intention is apparent upon the present will, it is material, before examining its  
 \*185 language, to consider the position in which \*the testatrix stood when she made it, both with respect to the estates devised and the family of the devisee.

As regards the estates, it appears by the schedule to the Master's report, that Quendon Hall and the bulk of the estates were devised to her in fee by her maiden name of Anne Webb (she being then unmarried), and that the devise was made to her by her cousin Martha Cranmer, who by her will "declared her express desire to be that the said Anne Webb should take and use the surname of Cranmer as her only surname" immediately after the decease of the testatrix.

She accordingly took that name, which on her marriage was assumed also by her husband; so that if there had been any children of the marriage, they would also have borne the name of Cranmer.

The testatrix, however, had no issue, at all events none which was living when she made her will.

It was under these circumstances natural that she should desire the estate, which had been thus devised to her, to be continued in the name of the family from which she had received it, and that she should lay upon its future owners the same injunction which had been laid upon herself.

The estate comprised, amongst other lands, the mansion house called Quendon Hall, in which the testatrix resided, and a small deer park. She was possessed of plate and furniture in the mansion house, and of a portrait of Archbishop Cranmer by Holbein. Another part of the Quendon Hall estates consisted of the perpetual advowsons of the rectories of Quendon and Chickney. She had other property, both real and personal, the particulars of which it is not material to state.

Her niece, Mary Anne Byng, was the principal object of her bounty. This lady was married, and had children \* then \* 186 living, viz. the respondent, Alfred Molyneux Byng, her eldest son, two other sons, and one daughter.

In this state of her property and of her family, the testatrix made her will. She first devises a farm and two houses to her brother, Henry Webb; but these, "if he does not marry and have children, are to go with my estate."

This expression seems to favour the notion that there was some estate intended to be preserved in the family, to which, in the events provided for, the property in question was to be added.

She then gives to her niece's second son, Henry Webb Byng, the livings of Quendon and Chickney, should he like the profession, and be qualified for them, or, failing that, to William Cranmer Byng, the niece's third son.

This provision for the younger sons of the niece is very reasonable if the elder son was to inherit the estate, but makes it improbable that she should intend them to take in addition an equal share of the bulk of the estates with their eldest brother, for whom no provision whatever is made by the will, except in the devise of the Quendon Hall estates.

After a devise of two houses in London, left to her by her husband, to a Mr. Gray, she proceeds to dispose "of all her Quendon Hall estates in Essex," and she gives them "in trust to my executors, for my niece, Mary Anne Byng, and her children." The expression "all my Quendon Hall estates" is explained by the circumstance that two small farms had been purchased by her husband, and added to the estate, and devised to her by him.

If the will had stopped here there can be no doubt that if the testatrix had died immediately after it was made, the niece and her children would have taken as joint tenants. The question is, are the words which follow in \* the same sentence con- \* 187 sistent with that intention? I think they are not. The furniture of the mansion house, and plate, and the portrait of Archbishop Cranmer, and other articles specified, are to go "as heirlooms with my estate." There can be no doubt that by "my estate" she means here what she had described as "all my Quendon Hall estates in Essex." The expression "my estate" is the same which she had used in the contingent gift of the property devised to Henry Webb. These directions seem to me to indicate

a clear intention that the mansion house and other parts of the estate were to be enjoyed by one person at a time, as one property, to which the chattels described would be attached as heirlooms.

This view is strongly confirmed by the direction that her niece, who is to enjoy the estate, shall take the name and arms of Cranmer. The testatrix adds, "and her children," rather indicating by the collocation of the words that she did not treat the mother and children as one class. Is it consistent with these careful provisions for preserving the name and arms, and making the furniture of the mansion house, and the portrait and other articles, heirlooms with the estate, that the mother and her children, of whom there were four then living, and might be (as, in fact, there were) several more born in the testatrix's lifetime, should divide the estate amongst them, and take by immediate gift articles which were given expressly as heirlooms, and several of which were incapable of division. This seems to me an intention which it is impossible to impute to the testatrix, and indeed this construction was but faintly contended for at the bar.

But it was said, though the mother may, in the first instance, take the whole, yet she takes only for life, and the children may take after her as purchasers. There is nothing, however, \* 188 in the will to restrict the mother to an estate for life, or to indicate that the children were to take in succession; and if the rule in *Wild's Case* be excluded, as this argument excludes it, the very foundation of the appellant's case is destroyed.

Nor would such a construction remove the main objection against which the appellants have to struggle. It would still require a partition of the estate, which the testatrix intended to be enjoyed entire. It would only postpone the division till the niece's death; and though the chattels given as heirlooms would go in succession on the death of the mother to the children, they would not go in the character of heirlooms, either in the legal or popular sense of the expression.

If, on the other hand, the word "children" be read in its secondary sense, "as heirs of the body," a reasonable and consistent meaning is given to the whole will, and the plan of it is simple and natural. A provision is made by means of the livings for a younger son. The niece takes the estates as tenant in tail; she takes also the heirlooms. On her death her eldest son succeeds

as tenant in tail, and the niece and the heirs succeeding, take the name and arms of Cranmer, and the name is perpetuated with the estate to which the testatrix has desired to attach it.

It is said that by this construction the gift of the chattels to go as heirlooms with the estate is defeated, because the first taker will take them absolutely. But this result arises from the rule of law, and the inference to be derived from the declared intention of the testatrix is not affected by the circumstance that the law will not permit that intention to take effect.

In truth, however, this construction does not necessarily prevent the intention of the testatrix, that these chattels should be annexed to the estate, from being carried into execution.

The property being in the same \* hands might be settled to \* 189 the destination to which she had designed it, just as the testatrix herself, with respect to the name of Cranmer, had executed the intention of the person from whom she had received the estate. The division contended for by the appellants would render impossible the execution of her intentions, either with respect to the estate or the heirlooms.

It seems to me, therefore, that if the will be read with reference to the circumstances which existed at the time when it was made, the inference is sufficiently strong to show that the word "children" must be read as a word of limitation, and that the niece, if she had lived, would have taken an estate tail.

The will was no doubt made in contemplation of those circumstances. But if the testatrix be supposed to have known the changes which afterwards took place in her lifetime (especially the death of her niece, with which she was probably acquainted), and to have intended her will to speak with reference to those altered circumstances, the inference I think is strengthened rather than weakened. According to this construction, the eldest son would be the first taker instead of his mother, and his enjoyment would be accelerated, and he would take the heirlooms as the mother would have taken them. Whereas the construction contended for by the appellants becomes more difficult, because there would be no enjoyment even for a single life of either the estate or the chattels, as the testatrix intended, and an estate in its entirety not very considerable, I think about 1400*l.* a year, would have to be divided amongst eight children, all of whom, some of them daughters, would have to take the name and arms of Cran-

mer, without any adequate provision to maintain a family in a respectable station.

\* 190 \* I think that we should not reverse a decision on the construction of a very doubtful will, in which two Courts have concurred, without a full conviction that it is erroneous. In this case, after anxious consideration, I have satisfied myself (contrary to the impression which was made upon my mind at the hearing) that the decree in question is right and ought to be affirmed.

*Sir Hugh Cairns.* — My Lords, on behalf of Captain Byng, the respondent, I am prepared to accede, if your Lordships should think it right to order it, to a declaration that the costs of the appeal should be provided for out of the estate.

THE LORD CHANCELLOR. — We are happy to receive that intimation.

Ordered, that the order of the 9th June, 1856, and that of the Lords Justices of the 25th November, 1856, be affirmed, and that the appeal be dismissed; and that the costs of all parties in respect of the appeal be paid out of the estate, the subject of the said appeal.

Lords' Journals, 5th June, 1862.

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\*HOLROYD v. MARSHALL.

1861. June 14, 17, 18. 1862. July 25; August 4.

A. P. HOLROYD and others, *Appellants*.

J. G. MARSHALL and others, *Respondents*.

*Mortgage of Present and Future Property. Novus Actus. Judgment. Creditor. Costs.*

In equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a

trustee for the vendee. This rule applies to personal property, as well as to real estate.

Such a contract, if made with respect to the sale or mortgage of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal.

T. was the owner of certain machinery in a mill; it was purchased by H., but not removed, and T. continued in possession. T. executed a deed (which was duly registered), by which it was declared that the machinery was the property of H. — that T. desired to repurchase it for 5000*l.*, but had not the money to pay for it, wherefore it was conveyed to B. in trust when T. should pay the money to transfer it to him, and if he did not pay the money to hold it absolutely for H. The deed contained a covenant by T. to insure the machinery, and another covenant that all the machinery which, during the continuance of the deed, should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. T. sold some of the original machinery, purchased new machinery, and sent to H. accounts of these sales and purchases, but nothing was done by or on behalf of H. to take possession of the newly purchased machinery. On the 2d April, 1860, H. served T. with notice of a demand for payment of the 5000*l.* An execution against T. was afterwards put in by a creditor: —

*Held*, reversing the decree below, that though there had been no *novus actus interveniens*, the title of H. was preferable to that of the execution creditor, as to the new as well as the old machinery.

*Mogg v. Baker*, 3 M. & W. 195, commented on.

The costs below ordered to be paid to the appellants.

JAMES TAYLOR carried on the business of a damask manufacturer at Hayes Mill, Ovenden, near Halifax, in the county of York. In 1858 he became embarrassed, a \* sale of his \* 192 effects by auction took place, and the Holroyds, who had previously employed him in the way of his business, purchased all the machinery at the mill. The machinery was not removed, and it was agreed that Taylor should buy it back for 5000*l.* An indenture, dated the 20th September, 1858, was executed, to which A. P. and W. Holroyd were parties of the first part, James Taylor of the second part, and Isaac Brunt of the third part. This indenture declared the “machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill,” to belong to the Holroyds; that Taylor had agreed to purchase the same for 5000*l.*, but could not then pay the purchase money, wherefore it was agreed, &c. that “all the machinery, implements, and things specified in the schedule (hereinafter designated ‘the said premises’)” were assigned to Brunt, in trust for



Taylor, until a certain demand for payment should be made upon him, and then, in case he should pay to the Holroyds a sum of 5000*l.*, with interest, for him absolutely. If default in payment was made, Brunt was to have power to sell, and hold the moneys, in pursuance of the trust for sale, upon trust, to pay off the Holroyds, and to pay the surplus, if any, to Taylor. The indenture, in addition to a clause binding Taylor, during the continuance of the trust, to insure to the extent of 5000*l.* contained the following covenant: "That all machinery, implements, and things which, during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisoes, and declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor,

\*193 his executors, &c. will at all times, during such continuance as aforesaid, at the request, &c. of the said Holroyds, their executors, &c. do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." The deed was, four days afterwards, duly registered, as a bill of sale, under the 17 & 18 Vict. c. 36. Taylor, who remained in possession, sold and exchanged some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860; but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holroyds served Taylor with a demand for payment of the 5000*l.* and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of *scire facias* against Taylor for the sum of 155*l.* 18*s.* 4*d.*, damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of York. On the 10th May, 1860, a similar writ, for 138*l.* 3*s.* 3*d.*, was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favour of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had

been purchased by Taylor since the date of the bill of sale. The sheriff insisted on taking under the writs these added articles, and the Holroyds, on the 30th May, 1860, filed their bill against the sheriff, and the other necessary \* parties, praying for an \* 194 assessment of damages and general relief. The cause was heard before Vice-Chancellor Stuart, who, on 27th July, 1860, made an order, declaring that the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the plaintiffs by virtue of the bill of sale. On appeal, before Lord Chancellor Campbell, on the 22d December, 1860, the Vice-Chancellor's order was reversed.<sup>1</sup> This present appeal was then brought.

\* *Mr. Malins and Mr. G. V. Yool*, for the appellants.<sup>2</sup> — \* 195  
The real question to be decided here is, whether the equitable

<sup>1</sup> In the course of his judgment Lord Chancellor Campbell said: "Upon this state of facts the plaintiff's counsel have strenuously contended before me, that they, under their equitable title, are to be preferred to the judgment creditor. Mr. Malins drew a legitimate consequence from this doctrine, that although the sheriff would be excused; if before the claim of the assignee he had seized and sold the goods and paid over the proceeds to the judgment creditor, the equitable assignees might still follow the proceeds in the hands of the judgment creditor, and maintain an action against him for money had and received, to recover the amount. But I am of opinion that, notwithstanding the equitable title of the plaintiffs to this property, as they had not perfected their title to it by any intervening act before possession taken under the execution, the judgment creditor is to be preferred. Till possession taken by the plaintiffs, they had only *jus ad rem*, the property remained in the judgment debtor, and the machinery was part of his goods and chattels liable to be taken under the *feri facias*. My judgment rests upon Lord Bacon's maxim, '*Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiatur effectum, interveniente novo actu.*' Before any subsequent act is done, the assignment gives an equitable interest as between assignee and assignor; but a legal interest subsequently, *bond fide* acquired before possession taken by the equitable assignee shall prevail. A bill of sale in this form, as far as non-existing goods are concerned, is only executory. If the right of the equitable assignee, who has not taken possession, were such as Mr. Malins contends for, it does seem strange that, till now, we have no instance of an equitable assignee filing a bill to restrain the sheriff from selling under a *feri facias*, and we have, as yet, no instance of an equitable assignee bringing an action for money had and received to recover, from the execution creditor, the proceeds of the execution which he has received from the sheriff."

<sup>2</sup> *De G. F. & J.* 596, 608, 605.

<sup>1</sup> Lord Campbell was sitting as Lord Chancellor at the time of the first argument in this appeal.

mortgagees are not entitled to a preference over the execution creditor with respect to the added as well as to the original machinery. It is submitted that the mortgage made their title perfect, and that nothing further was required to be done by them, or that if it was necessary for them to take possession under the deed, they did so in the person of Taylor himself, who for such a purpose was their agent in holding the property. The mistake here has been in deciding this case upon purely legal principles, and disregarding the rules of equity. At law, an assignment or contract relating to a thing not yet in existence, or not yet belonging to the assignor or contracting party, would be void unless it contained a power to seize or take possession of the thing assigned, and if it did contain such a power, that power must be exercised in order to render it valid, *Acraman v. Bates*.<sup>1</sup> In equity the doctrine is different; all things which are not yet in existence, or not yet belonging to the contracting party, may be the subject of an assignment or contract, and that will attach on them, and the assignee will have the same rights as to them as if the things had belonged to the assignor or the contracting party at the time of the contract. As Taylor here contracted to do all that was necessary to vest the added things in the appellants, equity considers that he did what he contracted to do, and that the things, therefore, did really vest in them.

\* 196 Whatever may be the rights of a \* subsequent purchaser, or judgment creditor, they can be no greater in respect of such property than those of the assignor at the time of the purchase or execution. A judgment creditor can never take more than belongs to the judgment debtor at the time of the execution, and though he obtains legal possession, it must still be subject to all the equities which affect the property. There is in that respect a distinction between a judgment creditor and a purchaser for value.

In *Robinson v. Macdonnell*<sup>2</sup> it was held that an assignment of the profits of an intended voyage would not at law pass to the assignee, for the assignor had no property, actual or potential, at the time of the assignment. But when the same case came before Lord Eldon,<sup>3</sup> he declared that a different principle was applicable in equity, and that principle so stated by him is entirely in favour of the appellants. The actual decision there is not in point here, for it proceeded on grounds which do not affect this case.

<sup>1</sup> 6 Jur. N. S. 295, 29 Law J. N. S. Q. B. 78.

<sup>2</sup> 5 Maule & S. 228.

<sup>3</sup> 8 Price, 269, n., nom. *The Ship Warre*.

*Mogg v. Baker*<sup>1</sup> was the case chiefly relied on by the other side. There it was said that the assignees of a bankrupt took such property as he was equitably, as well as legally, entitled to at the time of the bankruptcy. An expression of Baron Parke in that case was relied on. The facts were these: A. agreed to assign goods to B. by way of security for money advanced by B. for the purchase of them, and afterwards did so assign them; and it was held, that though such assignment would be void under the Insolvent Act, of which A. afterwards took the benefit, the goods would not pass to his assignees under that Act. But Baron Parke said:<sup>2</sup> "If the \* agreement was to mortgage certain specific furniture, \* 197 of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent its passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired — to give a bill of sale at a future day of the furniture and other goods of the insolvent — then it would cover no specific furniture, and would confer no right in equity. While the argument was going on, I have had an opportunity of consulting a very high authority, and it must be taken that the rule in equity is as I have stated it." There must be some mistake here. It was supposed that Lord Cottenham was the "very high authority" referred to. But Lord Cottenham has, in many cases, stated the reverse. An agreement of that sort does confer an absolute right in equity. It may be different at law, where it seems that even if the deed contained a power to seize the property, that power must be exercised in order to render it effectual, *Lunn v. Thornton*,<sup>3</sup> *Congreve v. Evetts*,<sup>4</sup> *Chidell v. Galsworthy*,<sup>5</sup> and *Allatt v. Carr*.<sup>6</sup> The case of *Hope v. Hayley*<sup>7</sup> is to the same effect; but in giving judgment in the present case,<sup>8</sup> the Lord Chancellor said, "there only legal rights were to be considered, and, consistently with that decision, the equitable assignee may succeed against the execution creditor." Unfortunately, however, his Lordship adopted and acted on the rule as stated in *Mogg v. Baker*. The rule there stated is not warranted by principle or authority. In \* equity the right of \* 198

<sup>1</sup> 3 M. & W. 195.<sup>2</sup> 6 C. B. N. S. 471.<sup>3</sup> 3 M. & W. 198.<sup>4</sup> 6 W. R. 578, 27 Law J. N. S. Exch. 385.<sup>5</sup> 1 C. B. 379.<sup>6</sup> 5 Ellis & B. 830.<sup>7</sup> 10 Exch. 298.<sup>8</sup> 2 De G. F. & J. 604.

the assignee is perfect without his having done any thing except taking his deed of assignment. As to the property existing at the time, that is not disputed, nor can it be disputed where there is, as there is here, a covenant that the after-acquired property shall be subject to the same security. This right of the assignee is available, not only against a judgment creditor, but against a purchaser for value of the specific thing, unless he has fortified himself with actual possession, and has done so without knowledge of the contract.

Try the principle with reference to property conveyed in a marriage settlement. In *Wilcocks v. Wilcocks*,<sup>1</sup> A. came under an obligation to purchase lands of 200*l.* per annum for the purposes of the settlement. He was not bound to purchase specific land, or to purchase it at a particular time, but when he did so, equity fastened on it and treated it as subject to the settlement. *Deacon v. Smith*<sup>2</sup> is to the same effect. So in *Bucknal v. Roiston*,<sup>3</sup> a supercargo of a ship "made a bill of sale of the goods on board, and of the produce and profits that should be made thereof," and this was held good against a judgment creditor as to all, including the goods which were not on board at the time the bill of sale was made, but were purchased after the sale of the first goods, and were thus acquired as part of the produce made by the goods originally on board. [LORD CHELMSFORD. — Were not the after-purchased goods part of "the produce thereof," and, therefore, within the words of the bill of sale? Were not the original goods represented in all the subsequent forms?] They were not more represented than are growing crops, or the profits of a voyage. In

*Curtis v. Auber*<sup>4</sup> an assignment of a ship, and its present  
\*199 and \*future earnings, was held valid in equity, although, as Lord Eldon expressly stated there, it would not be valid at law. So in *Douglas v. Russell*,<sup>5</sup> confirmed on appeal by Lord Chancellor Brougham,<sup>6</sup> an assignment of freight earned, and to be earned, was declared good in equity. All these cases proceed on the broad principle that a man may assign property of which he is not at the moment possessed, and that equity will fasten on the property when he does become possessed of it. In the Court below the case of *Langton v. Horton*<sup>7</sup> was mistaken. It was supposed

<sup>1</sup> 2 Vern. 558.

<sup>4</sup> 1 Jacob & W. 526.

<sup>7</sup> 1 Hare, 549.

<sup>2</sup> 3 Atk. 323.

<sup>5</sup> 4 Sim. 524.

<sup>6</sup> Prec. in Ch. 285.

<sup>3</sup> 1 Mylne & K. 488.

that Vice-Chancellor Wigram put his decision on the ground of possession having been taken, and the words "if the equitable owner or encumbrancer has done enough to perfect his equitable title, he has the better right" were quoted. These words did not mean what was supposed, for in another part of his judgment he expressly said, "The cases decide that non-existing property may be the subject of valid assignment." Nay, in *Acraman v. Bates*,<sup>1</sup> which was a case relating to a cargo not in existence when the contract was made, the title was not put on the fact of possession, but upon the validity of the assignment made by the owner. If otherwise, a judgment creditor might, by the mere act of taking possession, defeat the solemn deed of the assignor. *Hobson v. Trevor*<sup>2</sup> shows that in equity property will pass absolutely by the mere force of a contract, and in *Beckley v. Newland*,<sup>3</sup> a contract of a most uncertain kind was directed to be specifically performed. Two men married two sisters, daughters of a rich man; the husbands agreed that \* they would make an equal division \* 200 of the property they might derive from the father-in-law. This agreement was ordered to be specifically performed; the uncertainty as to what each might obtain constituting the valuable consideration to both. That was followed by Lord Hardwicke in *Wright v. Wright*,<sup>4</sup> and by Vice-Chancellor Shadwell in *Wethered v. Wethered*<sup>5</sup>; and the same rule had been acted on by Lord Eldon in *Harwood v. Tooke*.<sup>6</sup> [LORD BROUGHAM.—These two cases last named turned entirely on the lawfulness of the agreement.] In *Lyde v. Mynn*<sup>7</sup> A. granted an annuity to B., and covenanted to charge that annuity on any property to which he might become entitled under the will of his wife, and the agreement was held binding, and was not barred by the bankruptcy of the covenantor. That decision was affirmed on appeal by Lord Chancellor Brougham.<sup>8</sup> A still stronger case is that of *Metcalf v. The Archbishop of York*.<sup>9</sup> By the 2 Eliz. c. 20, charges on ecclesiastical benefices are prohibited. That was repealed in 1803 by the 43 Geo. 3, c. 84. In 1817 this statute was repealed by the 57 Geo. 3, c. 99, and the statute of Elizabeth revived; there was, therefore, an interval of fourteen years, during which it was lawful to charge ben-

<sup>1</sup> 29 Law J. N. S. Q. B. 78, 6 Jur. N. S. 294.<sup>2</sup> 2 P. Wms. 191.<sup>3</sup> 2 Sim. 183.<sup>4</sup> 1 Mylne & K. 688.<sup>5</sup> 2 P. Wms. 182.<sup>6</sup> 2 Sim. 192.<sup>7</sup> 6 Sim. 224.<sup>8</sup> 1 Vez. Sen. 409.<sup>9</sup> 4 Sim. 505.

efices. In that interval, namely, in 1811, an incumbent charged his benefice, in London, with an annuity, and covenanted that if he should afterwards be preferred to any other in substitution or in addition, he would charge the same with the annuity. The incumbent afterwards exchanged this benefice for a living at Leake.

In 1818 he executed a formal legal charge on that living ;  
 \* 201 this was held to be bad at law as \* contrary to the statute, but the covenant in the deed of 1811 was held to constitute a good equitable charge which attached upon the new benefice as soon as it was acquired. In that case there could be no title at law, the revived statute of Elizabeth prevented that, but equity held the covenant to be valid and effectual. Certain judgment creditors, who had notice of the annuitant's title, issued in 1832 a sequestration against the Leake benefice, and got a decision at law in their favour, on the ground of having a preferable legal title,<sup>1</sup> but Vice-Chancellor Shadwell declared that as the profits of the benefice belonged to the annuitant by virtue of his equitable title, the judgment creditors must refund to him the profits which they had seized. That decision was confirmed by Lord Chancellor Cottenham,<sup>2</sup> who was "clearly of opinion that there is an equitable charge independently of the covenant to execute a legal charge," and he denied "that all equitable charges rest upon specific performance, and the right to have a legal charge." And in that case Lord Cottenham referred to *Alexander v. Wellington*<sup>3</sup> as one of the authorities on which he founded his opinion, and that, being a case arising on the payment of the Deccan prize money, shows that the doctrine is not confined to cases affecting land. [LORD CHELMSFORD. — But in *Metcalfe v. The Archbishop of York* the annuitant had been in possession prior to the judgment creditor coming in.] That is so, but that fact did not affect the principle stated by Lord Cottenham, who acted upon it again in *Newlands v. Paynter*.<sup>4</sup>

The title attaches on the property the moment it comes

\* 202 into existence, *Beckley v. Newland*,<sup>5</sup> *Hobson v. Trevor*,<sup>6</sup> *Wright v. Wright*,<sup>7</sup> *Curtis v. Auber*,<sup>8</sup> *Douglas v. Russell*,<sup>9</sup>

<sup>1</sup> See *Cottle v. Warrington*, 5 B. & Ad. 447.

<sup>2</sup> 1 Mylne & C. 547, 557.

<sup>3</sup> 2 Russ. & M. 35.

<sup>4</sup> 4 Mylne & C. 408.

<sup>5</sup> 2 P. Wms. 182.

<sup>6</sup> 2 P. Wms. 191.

<sup>7</sup> 1 Vez. Sen. 409.

<sup>8</sup> 1 Jacob & W. 526.

<sup>9</sup> 4 Sim. 524, 1 Mylne & K. 488.

*Langton v. Horton*,<sup>1</sup> *Lyde v. Mynn*,<sup>2</sup> and these cases, so far from being shaken by Lord Eldon in *Harwood v. Tooke*,<sup>3</sup> were confirmed by him, his observations there having reference only to illegality in contract as between the two expectants and the testator.

Whatever may be the rights of a subsequent purchaser of the grantor's interest, they cannot be greater than those which the grantor himself possessed at the time such subsequent purchaser acquired his interest. A judgment creditor can never take more than belongs at the moment to the judgment debtor. Preller here was merely a judgment creditor; his title is not valid as against a prior equitable mortgagee, *Whitworth v. Gaugain*.<sup>4</sup> The judgment creditor takes subject to the equities affecting the property, *Taylor v. Wheeler*,<sup>5</sup> *Abbott v. Stratten*.<sup>6</sup>

*Mr. Amphlett* and *Mr. Hobhouse*, for the respondents. — If the argument on the other side can be sustained, a man may mortgage all his future property, no act be done to change the apparent possession, and yet no part of it can afterwards be taken in execution by a creditor. The uniform rule is, that in such a case there must be some act done upon coming into possession of the property, in order to give effect to such an assignment. On this subject the doctrine is the same at law and in equity, the only difference between them is as to the form in which the remedy is made complete. The real difference here between \* the two Courts \*203 was one of fact. The Vice-Chancellor thought that the assignee of the mill had obtained possession of the property, and that the *actus interveniens* had occurred. That was not so, in fact, otherwise the property could not have been taken in execution. The mortgagor continuing in possession is not the agent of the mortgagee. The assignment of personal property is only allowed in equity as a personal equity, valid as against the assignor. No trust attaches on future property; no personal equity can attach on land; nor can there be any trust of a personal chattel unless the equity is perfected by some subsequent act between the assignor

<sup>1</sup> 1 Hare, 549.

<sup>2</sup> 4 Sim. 505, 1 Mylne & K. 683.

<sup>3</sup> 2 Sim. 192.

<sup>4</sup> 3 Hare, 416, afterwards on appeal, 1 Phill. 728.

<sup>5</sup> 2 Vern. 564.

<sup>6</sup> 3 Jones & L. 603. See *Eyre v. McDowell*, 9 H. L. Cas. 619.



and the assignee. It is admitted on both sides here that the question now to be decided does not depend on principles of law, but of equity ; but the former must be considered in order to explain the rules and the operation of the latter. At law, the existing articles enumerated in the bill of sale will alone pass by delivery of the bill of sale or deed. Some subsequent act is necessary to pass future chattels. Bacon's maxim is here applicable. Power must be given to seize future chattels as they come into existence, and that power, in order to be valid as against creditors, must be exercised. The power alone may be sufficient as between the assignor and the assignee, but it cannot, without being exercised, affect the rights of third persons.

In equity, the remedy for the assignee of the property would be more complete than at law, for specific performance might be decreed ; but then the assignee must do something to perfect his right under the deed, or he would have no title to come into equity. Even if it could be said that it was a trust, it would be but an inchoate trust till something was done upon it. The deed

itself shows that that was here the intention of the parties,  
 \* 204 for there is an express covenant that Taylor " will \* do all necessary acts for assuring such added or substituted machinery, so that the same may become vested accordingly." Nothing whatever has been done for so vesting the added machinery, and therefore it has not vested. The respondents claim this added machinery, on the ground that the covenant in the deed gave them an equitable title to it. How does the equitable doctrine apply to a case like this? That doctrine was stated on " very high authority," by Baron Parke, in *Mogg v. Baker*,<sup>1</sup> " if it was only an agreement to mortgage furniture subsequently acquired — to give a bill of sale at a future day of the goods of the insolvent — then it would cover no specific furniture, and would confer no right in equity." In *Congreve v. Evetts*,<sup>2</sup> that doctrine was repeated in the same manner ; it was distinctly held that the power to seize future crops would be, if it remained unexecuted, of no avail against a judgment creditor, since it gave no legal or equitable title to any specific crops. That was the principle which Vice-Chancellor Wigram applied in equity in the case of *Langton v. Horton*,<sup>3</sup> where he very much relied on what had been done to

<sup>1</sup> 3 M. W. 195, 198.

<sup>2</sup> 1 Hare, 549.

<sup>3</sup> 10 Exch. 298.

perfect the title of the equitable assignee. Without overruling these authorities this decree cannot be impeached. The authorities on the other side are not sufficient for such a purpose. They are *Bucknal v. Roiston*,<sup>1</sup> *Newlands v. Paynter*,<sup>2</sup> and *Acraman v. Bates*.<sup>3</sup> The first was an actual contract as to the goods that might afterwards be put on board the ship, and not a mere covenant to do some act to make the party entitled to them, and it was besides a contract that enabled the assignor to sell the existing goods on substituting \* others for them, and so placed \* 205 the substituted goods in the very condition of those which had been removed. In fact, they represented, or were substituted for, the goods allowed to be removed. *Newlands v. Paynter* related to property specially bequeathed for the separate use of the wife, which property was actually existing at the time, and was under the control of the testator who created the charge, and could absolutely fix upon it any condition of enjoyment. And *Acraman v. Bates* was a case at law really depending on the question whether the goods were at the time of the arrival of the vessel in the order and disposition of the bankrupt within the meaning of the bankrupt law. That case, therefore, can have no bearing on the present.

The cases cited as to the assignment of future chattels are by no means decisive in favour of the appellants, but there are two others which are strong against him. First, there is the case of *Morse v. Faulkner*,<sup>4</sup> where a soldier, believing himself entitled, under the will of a relation, to a copyhold estate, got himself admitted, sold it at an auction at a public house, and surrendered it. The purchaser was admitted, and expended money upon it. It turned out that the soldier had not, when he sold it, any title to the property; it afterwards descended to him, but he did no further act to confirm the surrender. At law his heirs were held entitled to recover from the purchaser,<sup>5</sup> on which a bill was filed in the Equity Exchequer by the purchaser, praying that the heir of the soldier might be ordered to surrender the premises, &c. Lord Chief Baron Eyre refused the relief prayed. Another case is

<sup>1</sup> 1 Prec. in Ch. 285.

<sup>2</sup> 4 Mylne & C. 408.

<sup>3</sup> 6 Jur. N. S. 294, 29 Law J. N. S. Q. B. 78.

<sup>4</sup> 3 Swanst. 429, n.

<sup>5</sup> See *Goodtitle v. Morse*, 3 T. R. 365.

\* 206 *Carleton v. Leighton*,<sup>1</sup> where it was \* expressly declared by Lord Eldon that "the expectancy of an heir was not an interest, or a possibility, nor was capable of being made the subject of assignment or contract." These cases were considered by Lord Brougham in *Lyde v. Mynn*,<sup>2</sup> which has been relied on by the other side to show that he considered them merely to prove that though the contract is binding on the party himself as a personal contract, it cannot be enforced against his heir; but they undoubtedly establish this rule, that something more than the contract must occur after the property falls into possession; the *actus interveniens* is required to give effect to it. And *Harwood v. Tooke*<sup>3</sup> shows that Lord Eldon thought that such a contract could not be specifically performed.

The class of cases relating to future freight will not support the appellants' argument. In the case of the ship *Warre*,<sup>4</sup> the freight was assigned, and Lord Eldon seemed to recognise the proposition that future freight might be the subject of an equitable assignment; but the question as to a subsequent act being necessary to give effect to that assignment was not properly raised, and Lord Eldon thought that sufficient had not been done there to establish the right. In *Curtis v. Auber*,<sup>5</sup> and in *Douglas v. Russell*<sup>6</sup> there was something done in addition to the assignment, which gave force and effect to it. So that those cases are really authorities for the respondents. There is not an instance where, as here, money paid to creditors has been ordered to be paid back.

The case of *Metcalf v. The Archbishop of York*<sup>7</sup> is

\* 207 \* really strong for the respondents, for there the person in whose favour the equitable charge was made actually did take possession of the benefice, and was in possession, and had been so for a long time, under a sequestration, when he was ousted by the execution creditor. The equity was perfected before the right of the judgment creditor accrued. The *actus interveniens* had, therefore, taken place, and the judgment creditors had notice. Those were the true grounds of the decision. In *Whitworth v.*

<sup>1</sup> 3 Mer. 667.

<sup>2</sup> 1 Mylne & K. 688.

<sup>3</sup> 2 Sim. 192. See 1 Mylne & K. 685.

<sup>4</sup> 8 Price, 269, n. See *Lealie v. Guthrie*, 1 Bing. N. C. 697.

<sup>5</sup> 1 Jacob & W. 526.

<sup>6</sup> 4 Sim. 524, 1 Mylne & K. 488.

<sup>7</sup> 6 Sim. 224, 1 Mylne & C. 547.

*Gangain* also, the equitable assignee was in possession; and in *Langton v. Horton*<sup>1</sup> it is clear that though Vice-Chancellor Wigram used the general expressions already quoted, he entered largely upon the consideration of the act done by the assignee to perfect his title under the deed, and founded his judgment mainly on the fact that sufficient had been done for that purpose.

*Langton v. Horton* and the present are the only cases in which this precise question has arisen in equity; and in such a matter, where assignments of this sort must often have been made, the absence of decisions upon them in Courts of equity is significant.

*Mr. Malins* replied.<sup>2</sup>

1862. July 25.

*Mr. Malins* (*Mr. Yool* was with him), for the appellants, renewed the arguments he had before urged, and in addition to the cases previously cited referred to *Morris v. Cannan*,<sup>3</sup> where a transfer of shares in a \* joint stock company had been \* 208 registered by the secretary, though the share certificates had not been actually issued, and the transfer was held valid as against the assignees in bankruptcy of the transferror. In the present case there was a trust in favour of the appellants. No *novus actus interveniens* was necessary, but if it was, the delivery of the account of the newly purchased machinery constituted a sufficient *novus actus* on the part of Taylor. A fresh conveyance for their benefit was not required.

*Mr. Amphlett* (*Mr. Hobhouse* was with him), for the respondents. — The contract here, relating as it did to personal chattels, gave the appellants no right in equity beyond that of asking for specific performance. There must be a real (or if that was impossible), a constructive delivery of these new chattels in order presently to vest them in the appellants. There had not been any such delivery here. There ought properly to have been a new bill of sale of them, and a new registration of it. The delivery of the account of the new machinery was not mentioned in the bill, and

<sup>1</sup> 1 Hare, 549.

<sup>2</sup> The case stood over for judgment, Lord Chancellor Campbell died, and no judgment was given in the Session of 1861. In the following session the case was reargued by one counsel on a side.

<sup>3</sup> 31 Law J. N. S. Ch. 425.

that account cannot be treated as a *novus actus*. If it was so, and if the appellants had a legal title to the machinery, then they ought to have rested on that title, and ought not to have come into equity. *Langton v. Horton* clearly showed that the Vice-Chancellor thought some new act was necessary to perfect the title.

*Mr. Malins*, in reply. — *Langton v. Horton* has been misapprehended. Because the Vice-Chancellor there said that the equitable title had, in fact, been perfected, it was assumed that he meant some new act was necessary to perfect it. That was not his meaning.

\*209 \*THE LORD CHANCELLOR (LORD WESTBURY), after stating the facts of the case, said: My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in Courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particu-

lar kind of tea which is \* now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person. \* 210

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a Court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there \* is nothing to convey. So in equity a con- \* 211 tract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity,

transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case ; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as  
 \* 212 \* soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.

Some use was made at the bar and in the Court below of the language attributed to Mr. Baron Parke in the case of *Mogg v. Baker*.<sup>1</sup> That learned Judge appears to have given, not his own opinion, but what he understood would have been the decision of a Court of equity upon the case. He is represented as speaking upon the authority of one of the Judges of the Court of Chancery. Any communication so made was of course extra-judicial, and there is much danger in making communications of such a nature the ground of judicial decision ; but I entirely concur in what appears to have been the principle intended to be stated ; for Mr. Baron Parke, speaking of the agreement in the case, says, " It would cover no specific furniture, and would confer no right in equity." I have already explained, that a contract relating to

<sup>1</sup> 3 M. & W. 198.

goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest.

If, therefore, the contract in *Bogg v. Baker* related to no specific furniture, it is true that it would not, at the time of its execution, confer any right in equity; but it is \*equally true \* 213 that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition.

Whether a correct construction was put upon the agreement in *Mogg v. Baker* is a different question, and which it is needless to consider, as I am only desirous of showing that the proposition stated by the learned Judge is quite consistent with the principles on which this case ought to be decided.

I therefore advise your Lordships to reverse the order of Lord Chancellor Campbell, and direct the petition of rehearing presented to him to be dismissed, with costs.

LORD WENSLEYDALE. — My Lords, more than a year ago, when this case was argued at your Lordships' bar with very great ability on both sides, on behalf of the appellants by Mr. Malins and Mr. Yool, and on behalf of the respondents by Mr. Amphlett and Mr. Hobhouse, the late Lord Chancellor, with that extraordinary industry which he possessed, immediately after the argument committed his opinion to paper, and I was favoured with a perusal of that opinion, which I read with great attention. My noble and learned friend opposite (Lord Chelmsford) also committed his opinion to paper, and he favoured me with its perusal. Upon considering those opinions and the argument I had heard at the bar, my opinion then concurred with that of the late Lord Chancellor. But now that the matter has been argued a second time, and I have heard the opinion of the Lord Chancellor upon it, and find that the opinion of my noble and learned friend opposite is the same as it was before, I cannot say that I feel myself so confident in the arguments that have presented themselves to my mind as to press your Lordships to adopt them.

\* I have heard the very able and very clear opinion which \* 214 the Lord Chancellor has pronounced, and I cannot help saying, that I think that the views which I adopted upon the subject



after the first argument were not correct. I feel, therefore, that I must acquiesce in the judgment proposed.

LORD CHELMSFORD. — My Lords, this case, which has become of great importance, has been twice fully and ably argued, there having been a difference of opinion amongst your Lordships upon the first argument, which made it desirable that a second should take place. Upon the original argument I thought that the decree of my late noble and learned friend, Lord Campbell, could not be maintained; but I came to this conclusion with all the deference due to his great legal experience, and with the more doubt as to the soundness of my views, upon finding not only that he adhered to his opinion on hearing the question argued in this House, but that he was supported in it by my noble and learned friend Lord Wensleydale, for whose judgment (it is unnecessary to say) I entertain the most sincere respect. Aware that I was opposed to such eminent authorities, I listened to the second argument with the most earnest and anxious attention; but nothing which I heard in the course of it tended to shake the opinion which I had originally formed. I should, therefore, have been compelled to state this opinion under such discouraging circumstances, if I had not happily been fortified by the concurrence of the noble and learned Lord upon the Woolsack, before whom the last argument took place. His great learning and long experience in Courts of equity justify me now in expressing myself with some confidence in a case in which his views coincide with mine, and which is to be decided upon equitable grounds and principles.

In considering the question, I propose to advert to the various points which were touched upon in the course of both the arguments, although upon the last occasion many were omitted which were raised upon the first. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

The title of the appellants depends upon a deed dated the 20th September, 1858. [His Lordship here stated the bill of sale and the other facts of the case — see *ante*.] The machinery sold by the

sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect,\* or, in other words, that they \* 216 must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void, *Robinson v. Macdonnell*.<sup>1</sup> But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, upon which Lord Campbell rested his decree, and the property would pass.

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient *declaratio præcedens* in the words of the maxim; and although Chief Justice Tindal, in the case of *Lunn v. Thornton*, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods," he must have meant, that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at

<sup>1</sup> 5 Maule & S. 228.

law. This will clearly appear from the case of *Congreve v. Evetts*,<sup>1</sup> in which there was an assignment of growing crops and effects as a security for money lent, with a power for the

\* 217 \* assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them ; and Baron Parke said, " If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods ; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in *Hope v. Hayley* <sup>2</sup> (a case much relied upon by the Vice-Chancellor), where there was an agreement to transfer goods, to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods, Lord Campbell, Chief Justice, said, " The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer ; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it

\* 218 would be at law), but that the equitable \* right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case, it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created

<sup>1</sup> 10 Exch. 298.

<sup>2</sup> 5 Ellis & B. 830, 845.

under agreements of this kind is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by Baron Parke in *Mogg v. Baker*,<sup>1</sup> as the rule in equity which he stated he had derived from a very high authority, "that if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired, or" (the word "or" is omitted in the report) "to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." The meaning of these latter words must be that there would be no complete equitable transfer of the property, \* because there can be no doubt that the agreement stated \* 219 would create a right in equity upon which the party entitled might file a bill for specific performance.

This point is so clear that it is almost unnecessary to refer to the observations of Lord Eldon, in the case of the ship *Warre*,<sup>2</sup> in support of it. It must also be observed, that the proposition in *Mogg v. Baker* hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage, or to give a bill of sale at a future day. The only equity which could belong to a party under such an agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that all additional or substituted machinery shall be subject to the same trusts as are declared of the existing machinery.

Under a covenant of this description to hold that that trust attaches upon the new machinery as soon as it is placed in the mill, is to give an effect to the deed in perfect conformity with the intention of the parties, and as, by the terms of the deed, Taylor

<sup>1</sup> 3 M. & W. 195, 198.

<sup>2</sup> 8 Price, 269, n.

was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a Court of equity some further act was indispensable to complete their equitable title.

The judgment of Lord Campbell resting, as he states, upon Lord Bacon's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest subsequently *bond fide* acquired." It is agreed \* 220 that this maxim relates only to \* the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

No case has been mentioned in which it has been held that upon an agreement of this kind the beneficial interest does not pass in equity to a mortgagee or purchaser immediately upon the acquisition of the property, except that of *Langton v. Horton*,<sup>1</sup> which was relied upon by the respondents as a conclusive authority in their favour. I need not say that I examine every judgment of that able and careful Judge Vice-Chancellor Wigram with the deference due to such a highly respected authority. *Langton v. Horton* was the case of a ship, her tackle and appurtenances, and all oil, head matter, and other cargo which might be caught and brought home. The Vice-Chancellor decided, in the first place, that as against the assignor there was a valid assignment in equity of the future cargo. But the question arising between the mortgagees and a judgment creditor, who had afterwards sued out a writ of *fi. fa.*, his Honour, assuming that the equitable title which \* 221 was good against the assignor \* would not, under the cir-

<sup>1</sup> 1 Hare, 549.

cumstances of the case, be available against the judgment creditor, proceeded to consider whether enough had been done to perfect the title of the mortgagees, and ultimately decided in their favour upon the acts done by them to obtain possession of the cargo.

It was said upon the first argument of this case by the counsel for the appellants that the judgment of the Vice-Chancellor was, upon this occasion, fettered by his deference to the opinion apparently entertained and expressed by Lord Cottenham in the case of *Whitworth v. Gaugain*.<sup>1</sup> It will be necessary, therefore, to direct attention for a short time to that case, and especially as it has an immediate bearing upon the present occasion. The case as originally presented before Lord Cottenham, was an appeal from an order of the Vice-Chancellor of England appointing a receiver. The bill of the equitable mortgagees was founded entirely upon alleged fraud and collusion between the mortgagor and the tenants by elegit. The defendants had denied fraud and collusion, and also notice of the mortgagee's title at the time of obtaining possession under the elegits. The plaintiffs, in argument, attempted to set up a case not made by their bill, viz. that independently of the question of fraud, they had by law a preferable title to the defendants. The Lord Chancellor discharged the order for a receiver, solely on the ground that the plaintiffs had failed in making out the case on which they asked for the interference of the Court. Upon discharging the order, Lord Cottenham is reported to have said that in the argument a totally different turn was given, or attempted to be given, to the plaintiff's case; viz., that independently of the question of fraud, they had by law a preferable \*title to the defendants. "If (he \* 222 added) the bill had been framed with that view, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could have interposed by interlocutory order, because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which under the authority of an Act of Parliament they had a right to hold, the elegit being the creature of the Act of Parliament, and, therefore, they have a parliamentary title to hold the land as against all persons, unless an equitable case

<sup>1</sup> 1 Phill. 728.

stances had not existed, when the existence of those circumstances was established in proof and made the ground of the decision.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what *novus actus* he contended to be necessary, and he replied "a new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

• 226     • But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed.

LORD WENSLEYDALE. — My noble and learned friend will forgive me, but that was not mentioned in the bill.

LORD CHELMSFORD. — My noble and learned friend is quite correct in that; it must be taken that that was not mentioned in the bill,

mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established ; and, according to the opinion of Lord St. Leonards, " any agreement binding property for valuable consideration " will confer a similar right.

It does not appear from this review of the case of *Whitworth v. Gaugain*, that it could have had any influence over the question in *Langton v. Horton*, as to the imperfection of the mortgagee's title, unless something \* had been done to perfect it. \* 224. The point does not appear to have been at all noticed by Lord Cottenham, his observations having been confined to the competition between the equitable title of the mortgagee and the legal title of the judgment creditors. *Langton v. Horton* must therefore be accepted as an authority that there may be cases in which an equitable mortgagee's title may be incomplete against a subsequent judgment creditor. In that case the delivery of possession of the cargo on board the vessel was, as the Vice-Chancellor said, " impossible, as the vessel was at sea. The parties could do nothing more in this country with reference to it than execute an instrument purporting to assign such interest as Birnie (the mortgagor) had, send a notice of the assignment to the master of the ship, and await the arrival of the ship and cargo. This was the course taken ; and on the arrival of the ship at the port of London, the plaintiffs immediately demanded possession." The cargo was, in point of fact, in possession of the captain, as the agent for the owner, the mortgagor. It would have been rather a strange effect to give to the assignment of the future cargo, to hold that when it came into existence a trust attached upon it for the benefit of the mortgagee, that thereupon the captain became his agent, and that the mortgagee thereby acquired a perfect equitable right to the property, which was valid against all subsequent legal claimants. *Langton v. Horton* may have been rightly decided as to the necessity for the completion of the mortgagee's title under the circumstances which there existed, and yet it will be no authority for saying that in every case of an equitable mortgage of future property something beyond the execution of the deed and the coming into existence of the property will be necessary.

It certainly appears to be putting too great a stress \* upon this case, to urge it as an authority that an equitable title would have been defective if certain circum- \* 225



stances had not existed, when the existence of those circumstances was established in proof and made the ground of the decision.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

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LORD WENSLEYDALE. — My noble and learned friend will forgive me, but that was not mentioned in the bill.

LORD CHELMSFORD. — My noble and learned friend is quite correct in that; it must be taken that that was not mentioned in the bill,

and that was the answer given when I urged, in the course of the argument, that that account must be taken to be a sufficient *actus*. But still I am stating what my views are of the whole of the case. I think that the account delivered by Taylor to the mortgagees of the whole machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary; no possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and any thing, therefore, beyond this recognition of the mortgagee's right appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the \*notice of the claim of the mortgagees to the judgment \* 227 creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon. It is true that Lord Cottenham, in the case of *Metcalfe v. The Archbishop of York*,<sup>1</sup> said that if the plaintiff, in that case, was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was, that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favour of the judgment creditor. If Lord Cottenham really meant to say that notice by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice, must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon

<sup>1</sup> 1 Mylne & C. 547, 555.

trustees (the respondents), received a sum of 15,000*l.*, with directions to invest the same. They first paid the whole in to their bankers, not distinguishing it from their own money; they then invested 10,000*l.* of it on a valid security, and appropriated the remaining 5000*l.* to their own use in paying off a debt due from themselves to their bankers; but they wrote to inform Mr. Grieve that all the money had been duly invested, and that the interest "will be paid through our house." An inquiry having, on the 18th April, 1853, been made of them whether the whole 15,000*l.* had been lent to one person, Cheslyn Hall wrote to Mr. Grieve, "the 15,000*l.* was lent in one sum to one party. You shall have our account on your arrival in town, with a full statement of the securities and all other particulars." In the course of April they

had a transfer of a mortgage of 1000*l.* given by the appellant to a Mr. Bulpett, and a mortgage for \*4000*l.*, properly prepared by counsel. The latter was described in the instructions as "a new mortgage for 4000*l.* to the same parties as have taken the transfer of Mr. Bulpett's security." The appellant executed the transfer some time in the month of May, 1853, on a false representation by the Halls that it was a mere transfer of an existing mortgage, as Mr. Bulpett had desired to be paid off. He denied any recollection of his execution of the mortgage for 4000*l.*, and on neither occasion did he receive any money whatever on account of his execution of those deeds. The execution of them was obtained by the Halls for the purpose of covering their fraud as to the 5000*l.* On the 14th July, 1853, Cheslyn Hall wrote to Mr. Grieve a letter showing that 10,000*l.* had been invested on one security, and containing the following statement as to the other sum, "5000*l.* has been advanced on the Worthy Estate in Hampshire, belonging to George Wall, Esq., of ample value." During all this time Mr. Bulpett was pressing the Halls for payment of the 1000*l.* secured to him, but could never obtain a settlement. In the year 1854 the respondents dismissed the Halls from being their solicitors, and appointed Mr. Rivington, who in July of that year pressed them to give up the securities for the 15,000*l.* In that month the Halls laid instructions before Mr. Du Bois for preparing deeds, one of which was described to be "a draft mortgage deed" from the appellant to the respondents, containing a covenant to effect, and assign, policies on the life of the appellant. The instructions alleged that "these policies were intended as a

collateral security for repayment of a mortgage debt of 4000*l.*, but have not as yet been assigned to the mortgagees. It is now proposed to make a further advance of 1000*l.* to Mr. Wall by the same mortgagees." On 23d August, 1854, the \* drafts \* 232 were prepared, and on the 26th the Halls sent to Mr. Du Bois a request to make them "bear date the day after the original mortgage (1st March, 1853), as the further loan was actually effected at that time; the whole 5000*l.* advanced was one transaction, but on account of the arrangements consequent on effecting the policies, the whole transaction was not completed at the same time." Mr. Du Bois declined to do this, but made an alteration in the recitals, which he said would "render it unnecessary that the deeds should be dated on any other day than the day of execution." The Halls, however, changed the date to 1st August, 1853. On 1st September, 1854, the Halls delivered to Mr. Rivington deeds which they alleged to be the securities for the 15,000*l.* Among these was a deed, dated 1st March, 1853, from the appellant to the respondents, being "a mortgage of his interest in the real and personal estates of his father and brother, with a covenant to effect and assign a policy on his life for 4000*l.*, and interest," two policies, one for 2000*l.*, and another for 3000*l.*, an assignment of these policies, and the "further charge for 1000*l.*," which had been fraudulently dated 1st August, 1853.

The appellant, finding that he did not receive from the Halls the money which they, under his father's and brother's wills, were bound to pay him, filed a bill against them in September, 1855, praying for accounts. On the 11th October, 1855, the appellant received a notice from the respondents of their intention to sell his interest in the real and personal estate comprised in the deed of March, 1853. He at first denied having ever executed any mortgage to the respondents. In November a writ was issued at their suit against the appellant. Mr. Waters, the then attorney and solicitor for the appellant, wrote to Mr. Rivington asking for some explanation, and \* received in answer a statement \* 233 which showed that the respondents had some claims in respect of a mortgage, that there were arrears of interest due thereon, and that they were prepared to enforce their claims. As the great difficulty in the way of any arrangement appeared to be the impossibility of obtaining any account from the Halls, Mr. Rivington suggested that the appellant should let judgment go by default,

and that course was adopted, and judgment entered up for 5210*l.* 15*s.* 7*d.* In December, 1855, the Halls put in an answer to the suit of September in that year, in which answer they alleged the existence of a previous suit against them in the same character, and for the same purpose. The suit of September, 1855, was thereupon dismissed, but as the earlier suit was really the one which the Halls had instituted as a matter of form, of which they had the entire control, and in which they had taken no steps that could compel themselves to render any accounts, the Court substituted Mr. Waters for them as solicitor for the appellant. The Halls constantly evaded rendering any accounts, and it was not until some time after they had been declared bankrupts, namely, in April, 1859, that the appellant obtained from the assignees any real information as to the state of his affairs with them. His solicitor, Mr. Flower, then received papers belonging to the appellant, which had up to then been retained by the Halls, and it was found that there had not been any advance really made by the respondents to the appellant, but that the whole was "a fraudulent device of the Halls to account for the previous embezzlement of funds belonging to the respondents." Mr. Flower suggested a reference of the whole matter to a member of the equity bar. The suggestion was declined, and on the 26th May, 1859, the

\* 234 \* appellant filed his bill in Chancery to set aside the securities held by the respondents.

The cause came on for hearing before the Master of the Rolls, who thought that the appellant was entitled to the relief he prayed, and on 3d May, 1860, made a decree accordingly. On appeal to Lord Chancellor Campbell, the decree was, on 7th December, 1860, reversed, on the ground that after the notice of the mortgage in October, 1855, the appellant had so acted as to acquiesce in the claims of the respondents. The present appeal was then brought.

*The Solicitor-General (Sir R. Palmer) and Mr. John Pearson,* for the appellant. — So far as the appellant is concerned, there never was any consideration for the deeds. In fact, he never received, and the respondents never paid to him, or on his account, any money whatever. The respondents intrusted the Halls with their money; the appellant intrusted them with his deeds. The Halls misappropriated the money, and then, some time afterwards,

fraudulently transferred the deeds. No title to hold the deeds was created by that transfer; no equitable interest passed.

It is a settled principle at law, that when one man has to pay money to another, his obligation is not discharged by merely taking a credit with the agent of that other, *Todd v. Reid*,<sup>1</sup> *Bartlett v. Pentland*,<sup>2</sup> *Scott v. Irving*,<sup>3</sup> and this principle was applied in equity by the Master of the Rolls in *Young v. White*,<sup>4</sup> and *Young v. Guy*<sup>5</sup>; and there the fact that no defence had been \* made to an action on a bond for the amount was held to \* 235 be no ground for refusing equitable relief. *Vandaleur v. Blagrove*<sup>6</sup> is, from its peculiar circumstances, a still stronger authority to the same effect.

The equity on which the appellant claims relief is, that until he obtained possession of the papers in 1859, he was in utter ignorance of the real nature of the transaction. No admission made by him while so ignorant can be used against him. He had no reason to suspect that the Halls had committed a fraud upon him; but, on the other hand, the respondents had reasons for their suspicions, did know that the Halls had untruly represented the mode in which the 15,000*l.* had been invested, and had, in consequence, dismissed the Halls, and appointed another solicitor.

The appellant did nothing to confirm the transaction, except while he was in this state of ignorance, and so is not bound by acquiescence, *Murray v. Palmer*,<sup>7</sup> where Lord Redesdale said,<sup>8</sup> "Nothing will amount to a confirmation of a fraudulent transaction but an act done by the party after he has become fully aware of the fraud," and "and he must be aware that the act he is doing is to have the effect of confirming an impeachable transaction," a doctrine which had previously been fully stated in *Chesterfield v. Janssen*,<sup>9</sup> and was acted on in *Wood v. Downes*.<sup>10</sup> Acquiescence and confirmation may be treated as identical, but as Lord Justice Turner says, in *The Life Association of Scotland v. Siddal*,<sup>11</sup> acquiescence imports full knowledge, which certainly did not exist in this case.

<sup>1</sup> 4 B. & Ald. 210.

<sup>2</sup> 10 B. & C. 760.

<sup>3</sup> 1 B. & Ad. 605.

<sup>4</sup> 7 Beav. 506.

<sup>5</sup> 8 Beav. 147.

<sup>6</sup> 6 Beav. 565.

<sup>7</sup> 2 Sch. & L. 474.

<sup>8</sup> 2 Sch. & L. 486.

<sup>9</sup> 1 Atk. 301, 2 Vez. Sen. 125.

<sup>10</sup> 18 Ves. 120.

<sup>11</sup> 3 De G., F. & J. 74.

The money here was not paid by the respondents to  
 • 286 \* the Halls for the purpose of this mortgage, but had been previously deposited by them with the Halls for investment at their discretion. It was a debt due from them. The knowledge possessed by them, they being criminals in this matter, may perhaps not be imputable to either of the parties to whom they acted as solicitors ; but here it is certain that the respondents had earlier means of knowledge than the appellant, had acted to a certain extent on that knowledge, and that consequently, if the question of acquiescence is to be determined as a matter of fact, had better means than the appellant of discovering and remedying the mischief.

*Mr. Selwyn* and *Mr. Surrage*, for the respondents. — There is now no doubt that the appellant did execute the deeds, and his acquiescence here is conclusive against him. By that acquiescence he has prevented the respondents from putting themselves into the same situation in which they stood when the deeds were executed. It is even now admitted, that if the money had been actually paid to the Halls for the appellant, the transaction could not have been disputed. That admission decides the whole question. The money had been paid to them with authority to invest it. It did not matter whether that authority was given at a long or a short period before the investment took place. The authority operated up to the moment of the investment, and at first the appellant, when called on to pay, did not do more than deny that he had intended to execute a deed of this particular sort, or that he recollected executing it. The money must be treated as paid for the use of the appellant. He had given the Halls a general authority to borrow money for him, just as the respondents had given the Halls a general authority to lend money for them. For the  
 • 287 purposes \* of this case payment of the money to the Halls, in February, 1853, for the purpose of investment by them, is precisely the same as payment of it for that purpose in September, 1854. All the statements in the deeds admit the payment, and there are the express acknowledgments on the deeds in the shape of receipts for the money paid. These are conclusive against the appellant. Afterwards, and when he was dealing with *Mr. Rivington* as the solicitor for the respondents, he never disputed that the money must be treated as received by the Halls on his ac-

count; and after that he consented to a judgment by default against himself for the amount of the principal sum secured by the deeds. In *Perry v. Holl*<sup>1</sup> this subject of the powers to be exercised by an agent, and of the extent and effect of a confirmation of his acts by his principal, was fully discussed; and there, although the words of a power did not, in strictness, authorise an act done by the attorney to whom it was given, yet, when coupled with a correspondence between the attorney and the client, showing that the latter had believed the power to have that effect, and therefore had desired it to be so exercised when occasion should require, the client was not afterwards permitted to dispute the act which the attorney had previously done. And in that case, too, an actual payment of money to an attorney acting under a power was held not to be necessary to enable him to give a discharge. The cases of *Todd v. Reid*,<sup>2</sup> and *Bartlett v. Pentland*,<sup>3</sup> are not in point here, for they related to a special custom among brokers, by the operation of which in those cases the debt of one man was sought to be paid with the money of another.

Then what is the nature of the relief sought by this \* bill? It is asking equity to interfere to deprive the re- \* 238 spondents of the benefit of rights which they have duly established at law. Fraud is alleged, but no fraud was committed by, or in the least degree alleged to have been known to the respondents. Under such circumstances a Court of equity will not interfere to prevent a party from getting the fruits of a judgment he has obtained at law, *Protheroe v. Forman*,<sup>4</sup> and there too the judgment was only signed by default, and there were circumstances in the case which showed that the act of suffering the judgment to be signed had not been the deliberate act of the party to be bound by it. Here it was his deliberate act after his own attention had been distinctly called to the respondents' claim, after his suspicions had been roused as to the Halls, and after he had dismissed them, and employed another solicitor, and was actually proceeding against them in equity. These circumstances amount to an acquiescence which is binding on him.

*Mr. Pearson* replied.

<sup>1</sup> 2 De G., F. & J. 38.

<sup>2</sup> 4 B. & Ald. 210.

<sup>3</sup> 10 B. & C. 760.

<sup>4</sup> 2 Swanst. 227.



February 26.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, the respondents are the trustees of the marriage settlement of Mr. and Mrs. Grieve. They employed as their solicitors Henry and Cheslyn Hall, who were in partnership as solicitors in London. A sum of 15,000*l.* having become payable to the respondents as such trustees, they directed it to be paid to Messrs. Hall, to be invested upon mortgages to be found by Messrs. Hall. The money was accordingly, on the 4th February, 1853, paid into the banking house of Messrs. Dixon and Company, the bankers of Messrs. \* 239 Hall, to the credit of \* their private account. The money was not in any manner separated or distinguished from the moneys belonging to the Messrs. Hall. No particular securities were in contemplation at the time of such payment. The sum of 15,000*l.*, therefore, became in law a debt due to the respondents from Messrs. Hall.

The first use which the Messrs. Hall made of part of the money so acquired was to apply about 5000*l.* in discharge of a debt due from them to their bankers. They then invested 10,000*l.* upon mortgage of an estate belonging to a Mr. Commerell, and represented to their clients, the respondents, that the whole of the 15,000*l.* had been duly invested, and upon one security. Interest on the 15,000*l.*, as if it had been so invested, was paid by Messrs. Hall to the parties entitled under the trust.

In the year 1854 the respondents became dissatisfied with Messrs. Hall; and in July of that year they were discharged from being solicitors to the respondents, and the securities for the 15,000*l.* were demanded.

Messrs. Hall were the confidential solicitors of the appellant, who was a very young man, entitled for life to large real estates, of which the Halls had the entire management. They were also the trustees and executors of the will of the appellant's brother, and had the whole control of the property which the appellant was entitled to under that will. The appellant was completely in their power, and placed in them the most absolute confidence. The Halls, therefore, formed the design of getting the appellant to execute deeds which they might hand over to the respondents as the securities for the 5000*l.* which they had appropriated to their own use. Accordingly, they prepared two deeds of mortgage of the life interest of the appellant in the Worthy Estate,

one for the sum of 4000*l.*, and another for the sum of 1000*l.* \*The mortgage for 4000*l.* is made to bear date on the 1st March, 1853. The mortgage for 1000*l.* bears date the 1st of August, 1853. \* 240

Policies of insurance on the life of the appellant are included in both securities ; but the policy included in the mortgage for 4000*l.* was effected in 1849, and that included in the mortgage for 1000*l.* was not effected until the 5th July, 1853, which appears to be the reason why that deed was made to bear date the 1st of August, 1853.

The respondents having become very peremptory in their demands for the securities, Messrs. Hall on the 1st September, 1854, delivered the mortgage deeds for 10,000*l.*, together with these two mortgages for 4000*l.* and 1000*l.*, and the policies of insurance, to the solicitor of the respondents. They were accepted without difficulty, and no inquiry appears to have been made. And yet the circumstances were such as should have awakened very grave suspicions on the part of the trustees, who had already seen fit to discharge Messrs. Hall from being their solicitors. On the 9th of February, 1853, Messrs. Hall had written to Mr. Grieve that they had "concluded the arrangements as to the new mortgage," namely, the mortgage for the 15,000*l.* On the 20th April, 1853, Mr. Cheslyn Hall had written to Mr. Grieve in these words : "The 15,000*l.* was [were] lent in one sum to one party." These definite statements were contradicted by the securities delivered.

When the appellant executed the deed of 1st March, 1853, is not clearly ascertained, but it certainly was not until long after the date of the instrument. As to the deed, dated the 1st August, 1853, it is proved that it was not even prepared until the latter end of August, 1854, when Messrs. Hall, no longer able to evade the demands \* of the respondents, were compelled to \* 241 complete the making up of securities for the 5000*l.* that were due from them.

The appellant swears that he knew nothing of the deeds, and that he must have executed them on the representation of Messrs. Hall that they were instruments of a different nature. But it is not necessary for him to put his case so high ; it is sufficient to suppose that he executed the deeds in the faith that the respondents had paid, or would pay, the consideration moneys to Messrs. Hall as his solicitors and agents.

The legal estate in the property comprised in the mortgage deeds was, and is, outstanding, and the deeds would operate in equity only upon such equitable interest as the appellant was entitled to. But no interest whatever would pass to the respondents until the consideration moneys were either actually paid or applied unto or for the use of the appellant, or paid by the respondents under such circumstances as would estop the appellant from denying that he had received them.

On the question of payment, the case is exceedingly plain and simple. No payment of the 5000*l.* can be pretended to have been actually made by the respondents, except the payment of the 15,000*l.* on the 4th of February, 1853, which was a deposit by them in the hands of their own agents, Messrs. Hall, for the purpose of being invested on proper securities. The sum of 5000*l.* was misapplied by their own agents, who were intrusted with it long before the appellant's securities were executed, and it is not pretended that one shilling of the 5000*l.* was subsequently paid or applied by the Messrs. Hall unto or for the use of the appellant.

The respondents rely on the fact that the deeds, with receipts for the consideration moneys, signed by the appellant, \* 242 \* were, on the 1st September, 1854, delivered to the solicitor of the respondents, and they contend that the appellant is thereby estopped from denying the receipt of the money. And if the respondents were in a condition to prove that they had ever paid any sum of money to the Messrs. Hall for the use of the appellant, or (as already observed) that the Messrs. Hall had applied any part of the respondents' money for the benefit of the appellant, the respondents would be so far entitled to retain the benefit of the mortgage. But these are the particulars in which their case is wanting.

When the mortgage deeds were handed over to the respondents on the 1st September, 1854, they paid nothing on the faith and credit of the appellant's receipts, but took the deeds, trusting to the representations of Messrs. Hall, to whom they had confided their money, and by whom that money had been spent before these mortgages were thought of. And they now want to convert this payment to the Messrs. Hall as their own agents, into a payment to them as the agents of the appellant.

But the decree which the respondents have obtained from the late Lord Chancellor is rested on the ground of acquiescence and con-

firmation by the appellant of the respondents' title. The words of Lord Chancellor Campbell are, "I proceed upon the ground that the plaintiff has confirmed the validity of the mortgages with the knowledge or means of knowledge of the material facts of the case." Now, the material facts of the case are the facts which constitute the appellant's equity or title to relief. It is for the sake of clearly explaining the true nature of the appellant's equity that I have made the antecedent full statement of the case. The material facts that constitute the plaintiff's title are, that no sum of money was ever paid by the respondents to the appellant or his \* agents on the credit or for the purpose of these \* 243 mortgages, and that all which the respondents have done has been to abstain from demanding repayment of a sum of 5000*l.*, which they had intrusted to their own agents, Messrs. Hall, on the faith of the assurances of Messrs. Hall that they had paid that sum to the appellant, whereas, in truth, the Messrs. Hall had never paid or given credit for any part of that sum to the appellant.

It is most clear that these facts were not known to the appellant until the month of April, 1859. The respondents knew from the beginning that unless the Messrs. Hall had paid or applied for the use of the appellant the debt which, on the 4th of February, 1853, became due from them to the respondents, no consideration had been given for the mortgage; and the appellant, until some time in April, 1859, had reason to believe, both from the demands of the respondents and the assurances of Messrs. Hall, that the 5000*l.* had been *bonâ fide* paid by the respondents to the Messrs. Hall on the credit and for the purposes of the mortgages. The bill is filed within a month after the truth is discovered.

Under these circumstances it is impossible to impute to the appellant laches or acquiescence, or an intention of confirming the respondents' title. The burden of proving such a case would lie on the respondents, and could not be discharged, except by proving that the appellant was aware of the time and manner in which the respondents' money was deposited with the Messrs. Hall, and of the fact that no part of it had been applied for his own use or benefit. The case is plain and simple, as soon as the true nature of the appellant's equity is rightly apprehended. I shall, therefore, move your Lordships to reverse the decree of Lord Chancellor Campbell, and to direct that \* the petition of re- \* 244 hearing presented to him be dismissed with costs.

LORD CHELMSFORD. — My Lords, I agree entirely in the opinion which has just been delivered. The questions to be decided upon this appeal are, whether the appellant is entitled to have certain deeds of mortgage, and further charge delivered up by the respondents (the mortgagees), to be cancelled; or whether the respondents have any superior equity which ought to prevail over the right of the appellant to impeach the deeds in question as having been obtained from him by fraud?

No doubt can exist as to the fraud which was practised upon the appellant by his agents, the Messrs. Hall, they having procured him to execute the deeds for the purpose of their being used by them as securities for money of the respondents which they had previously misapplied.

The respondents urge two grounds in opposition to the appellant's claim. First, they say that the money to be laid out upon the mortgages in question was given by them to the Messrs. Hall, the appellant's solicitor, with his knowledge, and whether it was paid over to him or not, he is equally bound by the deeds which he afterwards executed. And, secondly, that if not originally bound by the deeds, the appellant has since ratified and confirmed them with full knowledge of the facts.

Upon the first question, if it had appeared that at the time of the execution of the deeds the Messrs. Hall had the money of the respondents in their hands for the purpose of investing it upon securities, and had afterwards applied the money to their own purposes, even though the appellant had been ignorant of the  
 \* 245 fact of the Messrs. Hall having received the money, the respondent's case would have been very different.

The learned counsel for the respondents endeavoured to establish that Messrs. Hall had authority to borrow on mortgage for the appellant, and that the sum of 5000*l.*, part of the 15,000*l.* received by them from the respondents, was paid for the use of the appellant. No other proof of this, however, was suggested, except the signing of the deeds, and the receipts for the consideration money, by the appellant, and his handing over the deeds to Messrs. Hall. But to give to these acts the retrospective effect contended for would be to make the instruments of the fraud the proof of the authority to commit it.

I think it clearly appears, that at the time of the execution of the deeds by the appellant there was no money of the respondents

in the hands of the Messrs. Hall which could have been paid over upon the execution of the securities. On the 4th February, 1853, the 15,000*l.* which had been received from the respondents by the Messrs. Hall for the purpose of being invested on securities, were paid into their private account, with their bankers, Messrs. Dixon and Company. At this time Messrs. Hall owed Dixon and Company 509*l.* upon their overdrawn account, and upon two promissory notes. They afterwards, and before the several times when the appellant executed the deeds, invested the sum of 10,000*l.* upon mortgages to Mr. Commerell, and misapplied the residue by payment of their own debt to their bankers, so that at the time when the deeds were executed no part of the 15,000*l.* remained in their hands.

This cannot, therefore, be said to be a case in which the agents of the appellant had received money for him, and had merely omitted to perform their duty by not paying it over. But the money of the respondents, which \* had been given to \* 246 Messrs. Hall, not to invest in a specific security, but generally for investment, had been misappropriated by them before the transactions with the appellant. The appellant's equity is, that the Messrs. Hall procured him to execute deeds for a supposed consideration of 5000*l.* in the whole, and handed these deeds over without receiving any value in respect of them from the respondents, who continue to hold the deeds, without having given any consideration for them, although they were received, or supposed to have been so, by means of their money placed in the Messrs. Hall's hands.

This view of the case appears to me to dispose of the respondents' equity upon the first question, without rendering it necessary to consider whether the communications which were made to them in the course of the transactions ought not to have put them upon their guard, and prevented their accepting the appellant's deeds when offered to them by the Messrs. Hall as securities for part of the money which they had received to be invested.

But, secondly, it is said that whatever may have been the original equity of the appellant to have the deeds in question delivered up to him, he has waived it by acquiescence and confirmation of the deeds, with full knowledge of all the circumstances. Of the recognition by the appellant of the validity of the deeds there can be no doubt ; but I think it was a recognition resulting from entire

ignorance of the most important fact in the case. It is impossible to believe that the appellant could have known that at the time he executed the deeds the Messrs. Hall had no money of the respondents in their hands to pay over to him ; and yet this is the sole fact upon which his right to set aside the deeds depends. The appellant does not say that he had forgotten the execution of the deeds, or that the notice of October, 1855, did not fully inform \* 247 him of the respondents' claim for 5000*l.* But he would, of course, be advised, that if his agents had received and had the money in their hands at the time of the execution of the deeds, the respondents' claim could not be resisted. The Lord Chancellor Campbell assumes that from the time of the notice till the filing of this bill, the appellant acted upon the supposition that the 5000*l.* had been paid by the Messrs. Hall as his agents, and that they were his debtors for the amount, and that he must be considered as having made repeated representations to the trustees, that by his agents he had received the money from them. I venture to think that these representations furnish the strongest proof of the appellant's ignorance of the truth of the case, and therefore entirely avoid the effect of the acquiescence upon which the respondents rely, and upon which the decree of the Lord Chancellor proceeded. I agree with the noble and learned Lord on the Woolsack, that this decree ought to be reversed.

It was afterwards ordered, that the decree of the 7th December, 1860, be reversed ; that the cause be remitted to the Court of Chancery, with direction that the petition for re-hearing on which that decree was made be dismissed with costs ; and that the costs paid under the decree be repaid by the respondents to the appellant.

Lords' Journals, 26th February, 1863.

\*MASSY v. LLOYD.

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1863. February 16, 17.

W. M. HUTCHINSON MASSY, *Appellant*.

EYRE and ANN LLOYD and others, *Respondents*.

*Children's Portions. Interest on them. "Payable."*

Where portions for younger children are created, if their interests are vested, and the contingencies have happened on which the portions are to be paid, interest on them is payable, and the portions must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention of the parties creating the portions is to govern.

But if the principal is not raiseable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words.

Lord Cottenham's observations on this point (*Lord Milltown v. Trench*, 4 Clark & F. 307, 308) adopted.

There is a distinction between the word "payable," when used in speaking of a sum payable to a beneficiary, and when used in speaking of a sum payable by a trustee.

In a marriage settlement the estate was given to trustees on trust to pay the rents to the wife for life; to raise by sale or mortgage a sum of 10,000*l.* for a child of the wife by a former marriage, and also a sum of 500*l.* for a relative of the first husband, then, after the death of the wife, to pay 1000*l.* a year to the husband for life; to raise 15,000*l.* for younger child or children, to be paid at such time, in such shares, and with such yearly interest as the wife should appoint, and, in default of appointment, at twenty-one or marriage, and until such portion should become payable, to raise money for the maintenance and education of the children as the wife should deem meet, not exceeding, &c.: Provided, that if there should be no younger child, or it should die before twenty-one or marriage, 5000*l.* additional should be paid to the wife's daughter by the former marriage. The wife died in 1806, leaving a son and a daughter, both very young. The daughter attained twenty-one, and married in 1824. The father died in April, 1859.

The Court of Chancery, in Ireland, had held that the principal sum of 15,000*l.*, though the right to it vested on the daughter marrying, could not be raised during the life of the father, but declared interest on that sum to have become payable from the date of her marriage.

The decree of the Court of Chancery was reversed, and the cause remitted with directions that interest did not become payable till the death of the father.

THIS was an appeal against a decree of the Court of Chancery in Ireland.



\* 249      \* By indenture, dated 15th May, 1804, made upon the marriage of Hugh Massy and Alice O'Donnel, certain estates were conveyed to trustees, for nine hundred and ninety-nine years, on trust, to pay the rents and profits to Alice O'Donnel for life, and after her death to raise, by sale or mortgage, 10,000*l.* for her daughter, Alice O'Donnel (her daughter by her first husband), to be paid to the said daughter at twenty-one, or marriage, with interest, at five per cent., from the death of her mother until paid, and subject thereto, to pay yearly, during the residue of the term, out of the issues and profits of the lands, to the said Hugh Massy, the yearly sum of 1000*l.* for life, and as to the residue of the rents and profits to pay the same to such person as Alice O'Donnel (the mother) should appoint, and in default of appointment, to her right heirs; and to pay to Charlotte O'Donnel (a relative of the former husband) 500*l.* on her marriage, or on the death of Alice O'Donnel (the mother), whichever should first happen. And as to the residue of the said term after the decease of the said Alice and Hugh Massy, it was limited to the trustees on the trusts therein declared, and subject thereto, and after the expiration thereof, to the first and other sons of the marriage in tail male, remainder to the sons of Alice O'Donnel by any other marriage, with divers other remainders, and an ultimate remainder to the right heirs of Alice O'Donnel (the mother.) And as to the residue of the term, it was declared to stand limited to the trustees in trust, in case there should be child or children of the said marriage other than an eldest son, by sale or mortgage of the residue of the said term, or a competent part thereof, and by the rents and profits thereof, in the mean time and until such sale, to raise 15,000*l.* for such child, or, if there should be more such children than one, the 15,000*l.* to be paid at such times,

\* 250      and in such shares, and \* with such yearly interest in the mean time, not exceeding, &c. as the said Alice O'Donnel (the mother) should by deed or will appoint; and in default of appointment, to be paid to or amongst such younger child or children, if more than one, equally, the portion or portions of such younger children, if a son or sons, to be paid to him or them at their respective ages of twenty-one, and if a daughter or daughters, at their respective ages of twenty-one, or days of marriage, whichever should first happen, and should, out of the rents and profits of the said premises so limited to the said trustees for the

said term of nine hundred and ninety-nine years, in the mean time, and until the said portion or portions should respectively become payable, raise such yearly sum and sums of money for the maintenance and education of such younger child and children as the said Alice O'Donnel (the mother) should deem meet, not exceeding interest at five per cent., and if no appointment by the said Alice O'Donnel, then at the rate of five per cent. per annum, provided that if there should be no child of the marriage other than an eldest son, or all should happen to die before their portions became payable, then 5000*l.*, part of the 15,000*l.*, should be paid to Alice O'Donnel, the younger, and the residue to such person as Alice O'Donnel, the elder, should, by deed or will, appoint. The marriage of Alice O'Donnel and Hugh Massy took place, and two children were born, Massy Hutchinson Massy, the father of the present appellant, and Ann Massy (now Ann Lloyd), one of the respondents. On the 25th of April, 1806, Mrs. Alice O'Donnel Massy made her will, by which she appointed the residue of the rents and profits of the lands, during the life of her husband, after payment of the interest on the 10,000*l.*, and after payment of the 1000*l.* a year, to trustees for the use of her son, to be paid to him at his age \* of twenty-one. She died 27th June, \* 251 1806. In 1824 Ann Massy married Eyre Lloyd, and on their marriage a settlement was made, by which the sum of 15,000*l.* was vested in trustees for the purposes of the marriage. M. Hutchinson Massy married in 1827, and suffered a recovery of the lands to the use of his marriage.

Payment of interest on the 15,000*l.* had been made from 1824 to 1846, when it ceased. In 1847, Mr. Hugh Massy, being still alive, and in receipt of his 1000*l.* a year, Eyre Lloyd and Ann his wife filed their bill in Chancery against M. H. Massy and the other proper parties, praying for an account and payment of principal and interest, or for a sale of the term, or a competent part thereof. A demurrer, as for want of equity, was filed to the bill, and in Michaelmas term, 1847, the Master of the Rolls made an order, declaring that the principal sum could not be raised until after the death of Hugh Massy, but that interest was payable in the mean time out of the surplus rents, and that a receiver ought to be appointed for that purpose.<sup>1</sup> M. H. Massy appealed against this decision. The appeal was heard before the Lord Chancellor

<sup>1</sup> 11 Irish Eq. 429.

Brady in 1848, when his Lordship declared that the principal could not be raised during the lifetime of Hugh Massy, by a sale of the term, either in possession, or in expectancy on his death, and also, that no appointment having been made to provide for the interest, it could only be raised along with the principal, and not by a receiver in the mean time.<sup>1</sup> There was no appeal against this decision.

M. H. Massy died in 1852, leaving his eldest son, the appellant, who entered into possession of the estates. Hugh Massy \* 252 died on the 19th March, 1859. On the \* 9th June, 1859, the respondents filed a cause petition, under the Irish Chancery Regulation Act, praying that the principal sum of 15,000*l.*, together with interest from 1846 (the last period of payment thereof), might be declared to be well charged upon the estates. The cause petition was referred to Master Litton, who, by a decretal order of 1st August, 1859, declared that the principal sum of 15,000*l.*, together with interest, from the date of the marriage of Ann Massy with Eyre Lloyd, was well charged on the estates, the subject of the settlement of 1804, and that arrears of interest thereon were to be calculated from the year 1846. This order was brought before the Master of the Rolls on application to be varied; but the application was, on the 14th November, 1859, refused. The order was then taken to the Court of Appeal in Chancery, when it was confirmed by order of the Lord Chancellor and the Lord Justice of Appeal, but without costs, as the Lord Chancellor entertained some doubt upon the subject.<sup>2</sup> The present appeal was then brought.

*The Solicitor-General (Sir R. Palmer) and Mr. Warren (of the Irish bar; Mr. W. A. Ezham was with them), for the appellant.* — The payment of interest up to 1846 having been made under a misconception of the rights of parties cannot now affect the question.

The term is here made use of for the purpose of preserving all the estates; and the deed particularly points out what is to be done under the trust. The 15,000*l.* were not raiseable during the life of Hugh Massy, and no interest accrued on that sum \* 253 till it was raiseable, that is to \* say, till after his death. There is an express direction to raise by sale or mortgage

<sup>1</sup> 12 Irish Eq. 298.

<sup>2</sup> 10 Irish Ch. N. S. 240.

the 10,000*l.* for Alice O'Donnel the younger, and a similar provision as to Charlotte O'Donnel; there is no such direction as to this sum of 15,000*l.* When, therefore, these two charges had been satisfied nothing was to be done with the term till after the death of Hugh Massy. To have sold the term, or any part of it, during his life, might have defeated his interest, and such a result was never contemplated when the deed was made. The wife might have lived till after the marriage of her daughter; and it is clear that Ann would not then have been entitled to have the 15,000*l.* raised for her benefit, yet, according to the argument on the other side, the principal sum would then have become vested, and the interest would have been payable. The deed shows that not to have been so, in the case even of the daughter by the first marriage, and there was no intention that it should be so in the case of the daughter by the second marriage. The wife here was entitled to the absolute benefit of the estates for her life, and such a claim of interest would have been in derogation of her absolute right. In like manner the husband was entitled to an absolute benefit for his life, and what the trustees were to do was only to be done by them when they were in possession of the "rents and profits," so that they could not by raising this sum affect or defeat the other previous trusts. The use of these words leaves no doubt as to the intention. [THE LORD CHANCELLOR. — Might not Alice have directed the payment of maintenance for the younger children in such a way as to derogate from her husband's annuity?] While the husband lived he was under a legal obligation to provide for his children, so that a provision for their maintenance, independent of him, would only take effect after his death. The provision "to \* be paid after their respective \* 254 ages of twenty-one" only refers to their attaining twenty-one after their father's death. The whole power vested in the wife is, to say to what portions they were entitled, and when the portions were to become "payable," a word the use of which shows that a distinction was intended between the time when the title to the portion vested, and that when it was to be paid. That power cannot be defeated by implication; she has not in terms appointed the payment to be made during her husband's lifetime. She has done that which contradicts such an intention. She has given him an annuity which might be defeated by a sale or mortgage of the term. Throughout the deed the portion to Alice

O'Donnel, and that to the younger child of the second marriage, are treated in a very different manner. Of course she trusted to her husband providing for the maintenance of his own children. If then the principal was not raiseable, there can be no interest due till after Hugh Massy's death. In *Smyth v. Foley*<sup>1</sup> interest in a case like this was held raiseable, but that was because such was the express direction in the deed, the trusts of the term being to raise portions for younger children by sale or mortgage of the term itself; otherwise, it would not have been so. In *Codrington v. Lord Foley*,<sup>2</sup> Lord Eldon declared the rule to be that it depended on the particular penning of the trust, and a fair construction of the whole instrument as to intention; and that was in accordance with what had been declared by Lord Hardwicke in *Stanley v. Stanley*.<sup>3</sup> The case of *Lyddon v. Lyddon*<sup>4</sup> is not in reality an authority the other way, but depended, as other cases did, on the express terms of the deed. That brings the \* 255 cases down to *Milltown v. Trench*.<sup>5</sup> There were certain legacies in that case which were declared to have priority, and of course the decision proceeded on that declaration, where it was plain and unequivocal; but as to other legacies, where the expressions were not equally plain, though they were held to be well charged on the lands comprised in the term, they were not to be raised until after the death of the testator's wife. As to interest on the legacies, the whole argument of Lord Cottenham is upon what he conceives to have been the intention of the testator, for on that and that alone he founds his judgment. The case of *Churchman v. Harvey*<sup>6</sup> is most like the present, and there it was held that the portions were not raiseable nor interest payable till after the death of the jointress. That case was referred to in *Reynolds v. Meyrick*,<sup>7</sup> and attempted to be explained away, but there a similar decision was arrived at, and the sums charged in the same way as here were held only to carry interest from the death of the jointress. The case of *Ravenhill v. Dansey*<sup>8</sup> is not applicable here, or is in favour of the appellant, for, though Lord Macclesfield there held the arrears of maintenance to accumulate, and to be payable when the reversion fell into possession, his judg-

<sup>1</sup> 3 Younge & C. Exch. 142.<sup>2</sup> 6 Ves. 364.<sup>3</sup> 1 Atk. 549.<sup>4</sup> 14 Ves. 558.<sup>5</sup> 4 Clark & F. 276.<sup>6</sup> Ambl. 335.<sup>7</sup> 1 Eden, 48.<sup>8</sup> 2 P. Wms. 179.

ment was founded entirely upon the particular words of the settlement, and he declared his own opinion, as to the general rule, to be against raising a portion or maintenance by selling a reversionary term. And as to the question of interest, it is to be observed here that the interest in all those cases was expressly reserved by the instrument itself, while here it is not so, but follows as a mere legal incident the title to the principal, which it is now admitted is not raiseable in the lifetime of the father.

\* *Mr. Rolt and Mr. Markham Giffard (Mr. Godfrey* \*256 *Lushington* was with them), for the respondents. — This is the case of a portion, a portion in the strictest sense of the word, payable out of property comprised in a marriage settlement. When did it vest? When did it become payable? It vested at twenty-one, or marriage; no one doubts that. Did it not, in the events which happened, become payable at the same time? If it did, interest accrued upon it when it became payable.

The case of *Stanley v. Stanley*<sup>1</sup> shows that where there is a term for years for raising daughters' portions payable at a certain time, and the interest therein is vested (as it is here), they shall not stay till the death of the father and mother. That is the general principle. That principle is adopted by Powell.<sup>2</sup> He admits that all these questions resolve themselves into inquiries as to the intentions of the parties, but says the portions "ought always to be presumed to have been intended to be raised at that period when the receipt of them will be most beneficial for those for whom they are provided, unless it be shown that the parties meant otherwise. Upon this principle it is a rule with respect to contingent terms for raising portions, that whenever all that is contingent as annexed to such terms has happened, the term shall be considered as commencing in the nature of a remainder expectant upon the estate for life which precedes it, and therefore a father is taken as dead without issue whenever the wife is dead by whom he is to have issue; the failure of issue male between the parties is tantamount to the decease of the father without issue male by the body of his wife. The term is then considered as vesting in interest, though not to take effect in point of profits until \* after the \*257 death of the father, for that he must die is certain, though the time when is uncertain. And if the time mentioned for the

<sup>1</sup> 1 Atk. 549.

<sup>2</sup> On Mortgages, 74 a, 78 a, &c.

vesting and payment is come (viz. twenty-one, or marriage, &c.) the term may be mortgaged or sold, though in remainder, and not in possession, for there is the equitable commencement of the term." And he sustains this doctrine by reference to the cases of *Greaves v. Mattison*,<sup>1</sup> *Gerrard v. Gerrard*,<sup>2</sup> and other authorities, and though he admits that some great men have doubted the doctrine, he is in favour of it. The exception is the clear indication of an intention to postpone payment. There is no such intention shown here; this portion is left to the operation of the general principle. The case is only taken out of the general principle, First, if the parent has only a life estate in the property, and a power to fix the payment of principal and of interest, in which case neither will become payable till the death of that parent, because that power may be exercised up to the moment of his death. Secondly, where there is a fixed time for payment, that does not interfere with the life estate of the parent, and in that respect there is no difference between a term to raise a sum and a trust to pay. [THE LORD CHANCELLOR. — Suppose a trust to raise and pay. Can the trust to pay come into force before the trust to raise?] There is nothing here to occasion that difficulty. The estate here was the wife's; it was settled on her absolutely, and the portion was not raiseable during her life. The husband was not to have the estate, but 1000*l.* a year from it. It was amply sufficient to give him that, and yet to pay the portions to \*258 younger \*children. The wife had power to dispose of all the surplus after the payment of the 1000*l.*, and she did dispose of it. *Lyddon v. Lyddon*<sup>3</sup> and *Gerrard v. Gerrard*<sup>4</sup> are clear authorities for raising such a portion on the death of either parent, and most certainly for showing that the title being vested in the child, by having arrived at twenty-one, or being married, the interest on the vested portion begins to run from that time. *Hellier v. Jones*<sup>5</sup> is to that effect. *Lyon v. Chandos*<sup>6</sup> is expressly in point. There, on the marriage of the Marquis of Carnarvon, a term was created to raise for daughters a sum of money, "to be paid to such daughters when they should respectively attain twenty-one years, or be married, which should first happen." The settle-

<sup>1</sup> T. Jones, 201, 1 Eq. Cas. Abr. 336, pl. 1.

<sup>2</sup> 2 Vern. 458.

<sup>3</sup> 14 Ves. 558.

<sup>4</sup> 2 Vern. 458. See *Staniforth v. Staniforth*, 2 Vern. 460.

<sup>5</sup> 1 Eq. Cas. Abr. 337, pl. 2.

<sup>6</sup> 3 Atk. 416.

ment provided a maintenance for the daughters, which was not to be raised till after the death of the Duke of Chandos. The Marquis of Carnarvon died three years after the marriage, leaving two daughters, one of whom married in January, 1743. The Duke of Chandos did not die till August, 1744, but upon the words of the settlement Lord Hardwicke held himself bound to declare that the money was payable from the date of the marriage, and he gave interest as from that date. In *Hall v. Carter*,<sup>1</sup> Lord Hardwicke declared against the notion of keeping children waiting till the portions intended for them were of no use. [THE LORD CHANCELLOR.— There the portions were treated as raiseable during the life of the father and the jointress. Here it is *res judicata* that the principal is not to be raised during the life of Hugh Massy. You have to argue that the interest can accumulate though the principal \* is not to be paid.] It was not decided here \* 259 that the principal was not payable, but only that payment could not be enforced during the life of Hugh Massy, by the appointment of a receiver over the estate. In *Codrington v. Foley*,<sup>2</sup> Lord Eldon expressly says the “general rule is that the portions shall be raised at the days or times limited, unless the will or settlement contain circumstances indicating an intention that they are not to be raised at those days or times.” No such intention is indicated here, and this case clearly falls within the general rule. [THE LORD CHANCELLOR.— Must we not, in all these cases, get at the intention ?] Certainly, but always remembering that this is a claim for portions, for provision for children, for their advancement in the world. Interest is given as the substitute for maintenance ; when, therefore, the terminus of the maintenance is found, then it is plain that the payment of interest begins. Here the maintenance is provided from the death of the mother, therefore, when the maintenance ceased, namely, at twenty-one, or marriage, interest began, whether the father was living or not. That must have been the intention of the parties. *Churchman v. Harvey*<sup>3</sup> does not affect this case, for there the words were “after the commencement of the term in possession,” which fixed and specified the period, and so got rid of the whole difficulty. *Reynolds v. Meyrick*<sup>4</sup> was a case under a will ; it was not a portion ; there was no child or grandchild of the testator ; no term was created ; an

<sup>1</sup> 2 Atk. 354.<sup>2</sup> 6 Vea. 364, 379.<sup>3</sup> Ambl. 335.<sup>4</sup> 1 Eden, 48.



estate was given to Hugh Montgomerie, with power to him to create a jointure; then there was a charge for children, and then a devise over. Hugh Montgomerie created the jointure, died, and it was held that this jointure, being a previous

\* 260 \* charge, came in first. In no way whatever has that case any bearing on the present. No doubt the word "payable" here is qualified so far as this, that it cannot operate till the death of Alice, for she had power to fix by her will when the money was to be paid. But there is no restriction on the payment, from the use of the words "rents and profits," for they imply a power to mortgage the term, not only for the gross sum, but for interest, *Hall v. Carter*.<sup>1</sup> In *Ravenhill v. Dansey*<sup>2</sup> it was distinctly decided that a reversionary term, raised for securing maintenance and portions for daughters, shall, in case of necessity, be mortgaged to pay either; and when fallen into possession, shall pay the arrears incurred, and there Lord Macclesfield recognised as established law, "that profits shall extend to any advantage which shall be made of the land by sale or mortgage, as well as rents." And in *Hall v. Carter*<sup>3</sup> Lord Hardwicke said, "the maintenance is actually a charge upon the estate; the trustees are to pay six pounds per annum to each daughter, till their portions respectively become due and payable, and is not postponed till after the term comes into possession, so that maintenance runs on till then; and though I do not know any instance where a sale has been directed for maintenance out of rents and profits, because it must be annual, which would create endless trouble, yet it is a charge upon the estate, and the arrear which is incurred must be paid off after it comes into possession." By the terms of this settlement the 15,000*l.* are payable when the daughter arrives at twenty-one, or marries. If not raiseable at that moment by sale or mortgage, the title to the money is then complete, and from that time interest on it begins to run. It is not a reasonable construction of such an

\* 261 \* instrument \* to say that the daughter's right can depend on her father's death. He might survive her, and yet she in the mean time might have married, and might have children. No one can pretend that under such circumstances her title to the portion would be suspended, and that her children would have no right to it, or to the interest on it, but that because she died before

<sup>1</sup> 2 Atk. 358.

<sup>2</sup> 2 Atk. 357, 358.

<sup>3</sup> 2 P. Wms. 179

her father it might, as in this case, go over to the child of the first marriage, already sufficiently provided for.

The will of Mrs. Alice O'Donnel Massy is important to show the intention of the parties. She had the power to fix the time when the portions should be raised. She gives "the residue of the rents, issues, and profits of the lands" after the payment to her daughter Alice of the interest on the 10,000*l.*, and after the payment to her husband of the 1000*l.* a year, to trustees. This fact shows that she expected a surplus, and this surplus is devoted to the maintenance and education of the younger children she may have by Massy, and then to accumulate to pay off the portions for daughters. So that if intention is to govern, there can be no doubt what the intention was here.

*Mr. Warren* replied.

March 3, 1863.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, in this case, the respondent, Mrs. Lloyd, is the only younger child of the marriage of the late Hugh Massy with Alice O'Donnel. On the occasion of that marriage in May, 1804, a settlement was made of large estates in Ireland belonging to Alice O'Donnel, afterwards Mrs. Massy, and by that settlement a sum of 15,000*l.* was directed to be raised as the portion of the younger child or children of the marriage.

The respondents, Mr. and Mrs. Lloyd, intermarried \* in \* 262 the year 1824, and their contention in the Court below was that on that event Mrs. Lloyd, as the only younger child, became entitled to have the portion of 15,000*l.* raised and paid to her; and, consequently, became entitled from the same time to interest on that principal sum until it should be raised and paid.

This appears to be the construction of the settlement which was approved of by the Lord Justice of Appeal. It is true that in argument at the bar the respondents admitted that a younger child would not be entitled to interest during the life of Alice Massy, the mother, but they contended that even if on the true construction of the settlement, the principal money could not be raised until the death of Hugh Massy, the father, yet that they were entitled to have the interest accumulated from the time when the principal became vested, and to have the arrears of interest raised

and paid, together with the principal, on the death of the father, and such has been the decision of the Court below.

In the argument in this House, and in the Court in Ireland, great reliance was placed on decided cases ; but I think little is to be gained from them beyond, first, the general conclusion that the question as to the time when portions become payable depends on a correct construction of the language of the settlement, or in the words of Lord Chancellor Talbot,<sup>1</sup> on the particular penning of the trust ; and, secondly, the conclusion which Lord Eldon seems to have intended to express (for there is some want of grammatical accuracy in the words imputed to him), namely, that if the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest is payable and the  
 \* 263 portions must \* be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention is to govern, and when the period has arrived at which a portion is clearly directed to be raised and paid, you must raise it, although the act of doing so involves a considerable sacrifice and waste of property.

The provisions of this settlement are of a singular character. The estates are demised to trustees for a term of nine hundred and ninety-nine years, to commence from the solemnization of the marriage ; and the provisions for the wife, the husband, the younger children of the marriage, and other objects, are effected by means of declaring successive trusts of this term ; subject to and after the fulfilment of these purposes the term ceases or becomes attendant, and the estates are limited to the use of the first and other sons of the marriage in tail male.

The first trust of the term after the solemnization of the marriage is to pay all the rents and profits of the estate unto the wife Alice for her separate use during her life. This is positive and express, exhausting so much of the term as may expire during the life of Alice the mother. It is the duty of a Judge, if possible, to construe the provisions of the settlement so as that they may be consistent and accordant with each other, but it would be difficult to show how the subsequent provision for the children could be intended to derogate from this first absolute trust in favour of the mother.

It was, as I have already said, admitted by the respondents'

<sup>1</sup> *Hibblethwaite v. Cartwright*, Cas. temp. Talb. 31, 32.

counsel that the trust to pay the portions did not arise until the mother's death. But as this admission could be founded on no other ground than the fact that the rents and profits are absolutely disposed of during the life of the mother, it must follow that if there is an equally absolute disposition of the rents during the life \* of the father, the same result would ensue, and \* 264 the portions could not be treated as directed to be paid until the death of the survivor of the parents.

The trust on the death of the wife, if the husband be then living, is, subject to a charge of 10,000*l.*, to pay yearly during the residue of the term out of the rents and profits of the lands, unto Hugh Massy, the husband, for so many years as he shall live, the annual sum of 1000*l.* And as to the residue of the rents and profits, to pay the same to such persons, and in such manner as Alice, the wife, shall by deed or will appoint, and for want of appointment, to the right heirs of the said Alice. This power was fully exercised by the will of Alice, the mother, and, consequently, the absolute disposition of the rents during the life of Hugh, the father, became just as complete and effectual as the antecedent trust thereof during the life of Alice, the mother.

It is in that particular, namely, the power to dispose, and the consequent disposition, of the surplus rents and profits during the life of the father, that the present case differs from the case of *Lyddon v. Lyddon*<sup>1</sup> decided by Sir W. Grant, and on which the respondents relied. In *Lyddon v. Lyddon* the term for raising the portions took effect immediately from the death of the husband, who was tenant for life, and, therefore, the term caught and included all the surplus rents and profits remaining after payment of the jointure to the widow, and they became applicable to the payment of interest on the portions secured by the term. That case would only, therefore, have been an authority for the present if the surplus rents above Hugh Massy's annuity had been undisposed of, and had fallen into the hands of the trustees to be \* applied upon the trusts declared of the residue of the \* 265 term, whereas the contrary is the case. It is probable that this power of disposition of the surplus rents was reserved to the mother for the purpose of enabling her to judge of the necessity of providing for the maintenance of the younger children.

There is an additional element of difference between the two

<sup>1</sup> 14 Ves. 558.

cases in the circumstance that the father, to whom in this case the annuity is given, is under a legal obligation to maintain his infant children.

It appears, therefore, that the rents and profits of the estates are absolutely disposed of during so many years of the term as shall elapse during the lives of the father and mother, and the life of the survivor. Accordingly, proceeding with the language of the settlement, we find the words are that "as to the residue of the said term of nine hundred and ninety-nine years, after the decease of the said Alice O'Donnel and Hugh Massy," the same is thereby limited to the trustees upon the trusts thereafter mentioned, that is, upon trust to raise and pay the sum of 15,000*l*.

Pausing here for a moment, it is material to observe, first, what is the subject matter of the trust; and, secondly, what is involved in the order and sequence of the directions to the trustees.

The subject matter of the trust, that is the property available for the portions, is so much of the term as shall be existing at the death of the survivor of the father and mother, and it is by mortgage or sale of this residue that the 15,000*l*. are directed to be raised. If, therefore, in the trust for raising the portions, which commences with the words "and as for and concerning the residue of the said term of nine hundred and ninety-nine years," the words "so much of the term as shall remain at the death of the survivor of Hugh and Alice Massy," were substituted for  
 \* 266 the word "residue," \* there would be no possible room for mistake, for every subsequent trust is a trust of and concerning this residue and the direction to pay interest in the mean time, and until the portions become payable out of the rents and profits of the premises; is a direction touching the rents and profits of the premises during the residue of the term, that is, after the death of the surviving parent.

The same conclusion is arrived at from considering the order and sequence of the trusts, which consist of a series of directions to the trustees, the first extending over the life of Alice the mother, the second over the life of Hugh the father, and the third coming into effect at the death of the survivor of the father and mother, and including all the directions touching the raising and payment of the principal and interest of the 15,000*l*. to the younger children.

But it was said in the Court below, and is the foundation of the

judgment of the Lord Justice of Appeal, that even if the principal money was neither raiseable nor payable until after the death of the surviving parent, yet that the right to interest arose immediately on the portion becoming vested by the marriage of Mrs. Lloyd ; and such interest must be accumulated and levied, together with the principal, immediately on the death of the surviving parent.

The Court below does not point out what are the words of the settlement which plainly and unequivocally give this supposed right to the interest during the life of either parent, although the trust for raising and paying either principal or interest had not arisen.

I concur entirely with the observation of Lord Chancellor Cottenham in *Lord Milltown's Case*,<sup>1</sup> when he \* speaks \* 267 of the absurdity of holding that the interest is to accumulate against the inheritance, to be raised when the remainder man shall be in possession. No words that reasonably admit of a different interpretation should be used for such a conclusion. But upon examining the trusts, that is, the directions given to the trustees touching the principal and interest of the portions, remembering that these directions arise, and are to be carried into effect after the deaths of the husband and wife, no difficulty will be found.

There is, first, a trust to raise the 15,000*l.* by means of the residue of the term, with a direction to pay it when raised with interest in the mean time (that is, between the death of the surviving parent when it became raiseable and the time of payment) to the younger child or children, as the mother shall appoint, and in default of appointment, to the younger child or children, if more than one, equally ; the portion of a son to be paid at twenty-one, and of a daughter at twenty-one, or day of marriage. And then follows a direction that the trustees do and shall, out of the rents and profits of the premises (that is, as already observed, out of the rents and profits accruing after the death of the surviving parent) in the mean time, and until the portions become payable, raise such yearly sum for the maintenance and education of the younger child or children, as to the mother should seem meet, not exceeding 5*l.* per cent., and if no appointment by the mother, then at that rate of interest, a provision which is clearly intended to meet the event of the younger child or children being under age, when the sum of 15,000*l.* is directed to be raised.

<sup>1</sup> 4 Clark & F. 277, 308.

In the construction of trusts of this description, it must be remembered that the word "payable" is used in a less extended meaning when it refers to the persons to whom portions are payable than when it is applied to the trustees by whom such portions are payable. A portion is not properly said to be payable by trustees until two things have occurred, viz. when the time appointed for raising it has arrived, and the person entitled is able to give a discharge for it; but a portion is often said to be payable to a child so soon as the event has happened which gives the child a vested interest in it; and in the latter case, the word "payable" denotes only that the child is entitled or enabled to receive such share or portion. And it is in this sense that the word "payable" is used in this settlement in the last provision affecting the 15,000*l.*, by which it is declared, that in the event of all the younger children dying before their portions shall become payable (that is, before the event at which their portions are made payable, or directed to be paid), 5000*l.*, part of the 15,000*l.*, should be paid to Alice O'Donnel, the younger, and the residue as the mother should appoint. With this construction, the provision is applicable to the event of all the younger children dying without attaining vested interests in the lifetime of both or either of the parents, and is consistent with the rest of the settlement.

I have examined this case, my Lords, with the greatest anxiety, because, I must admit, that my first opinion was different from that at which I have now arrived, but I feel bound to move your Lordships that the order of the Court of Appeal below be reversed.

LORD CHELMSFORD. — My Lords, I agree entirely with the opinion which has been expressed, that interest on the 15,000*l.* portion commenced only from the death of Hugh Massy, and not from the marriage of the respondents Eyre and Ann • 269 • Lloyd. The case is not free from difficulty, but this appears to me to have been the intention, as it is to be gathered from the scheme of the settlement.

The deed may be divided into two parts, first, that which relates to the provisions which apply to the period during the lives of the husband and wife; second, that which relates to the provisions which are applicable after their deaths. The term of

nine hundred and ninety-nine years was created to serve all these purposes.

During Alice O'Donnel's life all the rents and profits of this term were to be paid to her, or as she should direct. After her decease 10,000*l.* were to be raised for her daughter Alice, to be paid at her age of twenty-one, with interest from the death of her mother ; and subject to this charge, Hugh Massy, surviving his wife, was to receive 1000*l.* a year out of the rents and profits of the term for his life, the residue of the rents and profits (by which clearly is meant the surplus rents and profits after payment of the 1000*l.* a year to Hugh Massy) being made subject to the appointment of Alice the wife. The application of the whole of the rents and profits during the lives of Hugh Massy and Alice is thus carefully provided for. The settlement then proceeds to dispose of the residue of the term itself, i. e. that which might remain of the term after the deaths of Hugh Massy and Alice ; and it deals with the residue, and with the rents and profits of that residue. By the mortgage or sale of the residue, and by the rents and profits in the mean time, the 15,000*l.* portion is to be raised, and paid to a younger child, or to younger children, at twenty-one, or marriage.

The question is, out of what is the portion to be raised ? The answer must be, out of the residue of the term, and of the rents and profits of that residue. Therefore, although the portion may have vested during the lives of \* Hugh Massy and \* 270 Alice, yet it could not be raised and paid until the term of nine hundred and ninety-nine years had become the residue, out of which it was to be satisfied, by the death of the survivor of Hugh Massy and Alice. If, then, the portion could not be raised till the death of Hugh Massy, by the express provision of the settlement, it is difficult to conceive that it was intended that the interest which could not be raised before the principal, should accumulate in the mean time to the prejudice of the inheritance.

Some stress was laid in the argument for the respondents upon the clause providing for the maintenance and education of the younger child or children till the portion or portions become payable. This clause appears to me, however, rather to favour the view presented by the appellants. The words introducing this clause are not "do and shall, out of the rents and profits," but "out of the said rents and profits," being the rents and profits antecedently mentioned, viz. those of the residue. The scheme of



Renfrew, in Scotland, on the 12th September, 1755. He had one sister, who married one George Macfarlane. The testator was apprenticed to a surgeon, and about the year 1781 went out to the East Indies as a surgeon, in the service of the East India Company. In 1789 he purchased from the trustees of his father's creditors the estate at Clippens. When stationed at Ferruckabad he cohabited with a native woman named Raheem Beebee, and had by her a daughter named Susan. In 1808, at Cawnpore, he married, with all lawful forms, one Margaret Douglas Fearon, by whom he had two sons, Peter and John, born respectively in 1811 and 1813. The daughter Susan was sent to England for her education. In 1818 the testator made a will, which, among other things, contained the following bequest: "I give, devise, and bequeath to my ancient housekeeper, Raheem Beebee, who served me with fidelity for nearly eighteen years, the monthly sum of 100 sicca rupees, for the term of her natural life. I further will and declare that she may be permitted to live in the house now occupied by her [at Calcutta] for the term of her natural life."

. . . . "To Miss Susan Cochrane, a child born at Cawnpore, in the East Indies, on the 17th day of December, 1807, and now at the boarding school of Miss Campbell, No. 7 Brunswick Square, London, I give and bequeath the sum of one lac of sicca rupees (12,500*l.*), clear of legacy tax." Early in 1819 the testator, who had made a handsome fortune in India, returned, with his wife and two sons, to Europe, and proceeded to Scotland. The house at Clippens had been four years before then thoroughly repaired at his expense, and his sister, Mrs. Macfarlane, was then residing in it. He travelled about Scotland during that year, and did not go to reside at Clippens till some time in 1820. He main-

\* 274 tained there a large establishment of \* servants—built a riding-house, introduced Arab horses, and gave himself up to the breeding of stock and the improvement of the estate. In 1820 Mrs. Macfarlane died. In August, 1821, the testator made a holograph will, repeating in substance the provisions made for Raheem Beebee and his daughter, and adding that if the lawful issue of his sons, Peter and John, should fail, the whole of their fortunes should be transferred to the eldest lawful son of Susan, on his assuming and using the name of Cochrane, or otherwise to be equally divided amongst all her legitimate children. Towards 1825 he began to complain of the climate of Scotland, and in May

of that year, when rumours about his wife and one of his male servants had become very rife in the neighbourhood, and the visits of the neighbouring families had been interrupted, he left Scotland for Switzerland. He told Crow, his gardener, that he should do so, and that he should be absent three or four years. The reasons assigned for his departure were that the climate of Scotland did not agree with him, and that he wished to put his two sons to school in Switzerland, and their mother did not like to be far away from them. In May, 1825, he sent back Susan to India, and in a letter written on that occasion to a friend there, a Mr. Thomas, a surgeon in the army, commending the young lady to his care, and suggesting his wish that she should settle in India, he said, "You may assure the young gentleman, who may meet with your and Mrs. Thomas's approbation, that, on his marriage with her, he shall have the sum of 2000*l.* sterling; nor will that be all: she is, and will be, mentioned in my will, but to what further amount I cannot precisely say." On leaving Clippens, he dismissed all his servants, except Crow, his gardener, who was left to take care of the establishment generally, and Macdonald, his coachman, to whom was \*especially confided the care of the horses \*275 and the breeding stud. The furniture was packed up, the plate was sent to the Union Bank at Paisley to be taken care of, and Mrs. Crow and her daughter were left in charge of the house. The testator always appeared much attached to Clippens as the residence of his ancestors, and refused to take down the old house in which he had been born, though many of the neighbouring gentry had tried to persuade him to do so. He was frequently buying new property in the neighbourhood, and was, not long before his death, engaged in making a contract for such a purpose, which was concluded after his death. In July, 1825, he went to Hofwyl, to put his sons under the care of Dr. Fillenberg; but after a few months' residence in Switzerland, he left, and in May, 1826, went to Paris, where he resided in furnished apartments, in the Boulevard des Capucines, and placed his sons at school in the neighbourhood. In September, 1826, the daughter Susan married Lieutenant Moorhouse, in India, and came back to England in 1828. In July, 1829, the testator came to Scotland, spending a few days in London on his way. He brought his wife and sons with him, they lived at an hotel in Glasgow, but he himself paid frequent visits to Clippens. In a conversation with Crow, who ex-

pressed his regret that his master did not come back to reside at Clippens, he said he should not come just then, but it would not be long before he should do so. In September, 1829, the testator gave to a solicitor in Edinburgh heads of instructions for a will, or testamentary disposition, in which he described himself as "Peter Cochrane, Esq., of Clippens, in the parish of Kilbarchan and county of Renfrew, late first member of the Medical Board of Bengal," &c. ; and he renewed, almost in the words of the will of 1818, the bequest to Raheem Beebee, but said nothing of

\* 276 any provision \* for his daughter Susan. He devised his estates to his two sons, and failing them and their issue, to "the eldest lawful son of Mrs. Susan Cochrane or Moorhouse, wife of Lieutenant Moorhouse, &c., and who shall assume and bear the surname and arms of Cochrane," and in default of her having a son, to be equally divided amongst her other lawful children. This testamentary disposition was duly executed in Scotland. In November, 1829, the testator returned to Paris, and at first resumed possession of his furnished apartments in the Boulevard des Capucines ; but early in 1830 he took, on a lease for three years, determinable at three months' notice, some very large apartments in the Place Vendôme, and furnished them very expensively, bringing also some articles of furniture from Clippens (as to which he constantly corresponded with Crow), and setting up a large establishment in servants, horses, and carriages. At the latter end of 1830 the son, Peter, married. On the 18th June, 1831, the testator, being then in ill health, began a journey to England, leaving his establishment in the Place Vendôme, but accompanied by his two sons and a physician ; he only reached Beauvais on the evening of that day, and there died.

The testamentary disposition of 1829 was, in December, 1831, proved as his last will and testament.

In March, 1832, the appellants filed a bill against the executors and all necessary parties, setting forth the facts relating to the promise to provide for the daughter Susan, and claiming not only the 2000*l.* mentioned in the letter to Mr. Thomas, but also the lac of rupees mentioned in the wills of 1818 and 1821, and alleging that the testator, in making the deed of settlement and disposition in 1829, had no intention to revoke the previous gifts. The bill was afterwards amended, and the claim in respect of the lac of rupees was not insisted on, but the liability of the

\* testator's estate to make good the 2000*l.*, and a settle- \* 277  
ment of that sum, made in September, 1826, on the occasion of Susan's marriage, in virtue of the authority given in the testator's correspondence, were insisted on. In September, 1834, Mrs. Cochrane died. The son John died in April, 1835, unmarried; the son Peter died in the following July, without issue. His widow married a Mr. Barton, who died, and she afterwards married Mr. Lord, the respondent, who, having taken out the necessary letters of administration, became the personal representative of Mrs. Fearon Cochrane and her two sons, Peter and John. In May, 1835, the then Vice-Chancellor of England made a decree in favour of the appellants, so far as regarded the 2000*l.*

Other proceedings were afterwards taken in Chancery, and the appellants set up a claim that there had been a marriage between the testator and Raheem Beebee, and alleged that if they should fail in establishing that marriage the appellant, Susan Moorhouse, was entitled to a share of Dr. Cochrane's property by virtue of the law of France, in which country they insisted that he was domiciled at the time of his death. This new claim became the subject of a reference to the Master, who in July, 1847, made his report, finding that Dr. Peter Cochrane, the testator, was domiciled at the date of his will, and at the hour of his death, in Scotland. This report was afterwards confirmed.

In December, 1851, this bill was, by a decree<sup>1</sup> of the Master of the Rolls, dismissed, but without costs. On appeal, the Lords Justices, in July, 1852, confirmed his Honour's decree.

There were questions raised and argued as to the fact of the alleged marriage with Raheem Beebee, and as to \* the \* 278  
right of the appellants to have a commission sent out to India to take evidence on the subject, and also as to the effect of the testamentary disposition of 1829 operating as a revocation of the wills of 1818 and 1819, so as to defeat the gift of the lac of rupees to the testator's daughter Susan. The various matters in discussion came before Vice-Chancellor Kindersley, who, on the 14th February, 1859, pronounced a judgment<sup>2</sup> adverse to the appellants. Other proceedings followed, and finally orders, dated 18th July, 1859, 12th June, 1860, and 19th April, 1861, were made, founded on that judgment. All the questions raised below were argued on this appeal, but the only matter ultimately de-

<sup>1</sup> 15 Beav. 341.

<sup>2</sup> 4 Drewry, 366.

cided by the House which calls for a report, was that relating to the question of domicile.

*Mr. Rolt* and *Mr. Glasse* (*Mr. R. G. Welford* was with them), for the appellants. — The evidence here shows that the testator had abandoned his Scotch domicile, and had adopted a domicile in France. In Scotland his wife, to whom he appeared to be much attached, and who certainly had the greatest influence over him, was not visited by the families in the neighbourhood. This was a potent motive for him to abandon his Scotch domicile, and as she was much younger than himself, and he could not bring her back to Clippens, his quitting that place might well be assumed to be quitting it for ever. They referred to numerous expressions in letters of the testator, which indicated that he had no intention of returning to Scotland, and contended that the conversation with Crow, and expressions similar to that conversation contained in some of the testator's letters, were merely used with the intention to mislead, as the testator did not choose to have it thought that he was driven away from the place; but nevertheless, it was his fixed purpose never to return there. The motive for adopting a French domicile was ample enough, and the length of residence in France was in accordance with the motive. That long residence effectuated a change of domicile. In *Bempde v. Johnstone*<sup>1</sup> Lord Chancellor Loughborough expressed himself so as clearly to show that the only place of residence which "could not be referred to as adopted for an occasional and temporary purpose" was the place of domicile. Now *Anderson v. Laneville*<sup>2</sup> establishes, that a residence in a country until the death of a particular individual shall happen is not a residence for a temporary purpose. Here the testator never intended to leave his French residence during the life of his wife. If a man goes to a particular country, believing that his health will not permit him to live elsewhere, his residence there constitutes a domicile, *Forbes v. Forbes*,<sup>3</sup> and other equally strong motives for a continued residence in any particular place must have the same effect, *Aikman v. Aikman*.<sup>4</sup> *Munro v. Munro*<sup>5</sup> does not contradict that principle, but was decided on the proof there given that the long-continued resi-

<sup>1</sup> 3 Ves. 198.

<sup>2</sup> 9 Moore, P. C. 325.

<sup>3</sup> Kay, 341.

<sup>4</sup> 3 Macq. Scotch App. 854.

<sup>5</sup> 7 Clark & F. 842.

dence in London was, from the beginning, only intended to be temporary, and had been continued from temporary causes, with the constantly recurring declaration of Munro that he was about to return to Scotland. In *The Attorney-General v. Pottinger*<sup>1</sup> Mr. Baron Bramwell put the matter thus, that the intention to reside must be taken to be in that place where he had taken up his residence permanently, or, as being a more correct expression, “for an indefinite time” — a description which \*in this \* 280 case would apply directly to France. In *The Attorney-General v. Rowe*<sup>2</sup> the domicile of origin would have been held to be abandoned, and a new one acquired, but that the circumstances there contradicted any intention of that kind; here they favour it, and can only be understood in connection with such an intention. In *Blackburn v. Vaughan*,<sup>3</sup> before Sir John Dodson, in July, 1857, the fact of breaking up an establishment in this country, and taking the lease of a house in France, was held sufficient to show a change of domicile. [LORD CHELMSFORD. — There the man sold all his furniture when he went away to France. LORD CRANWORTH. — And he had married a French wife, and had given up his office in this country.] The facts here are equally strong to show an intention to give up the Scotch domicile, and to acquire a French one. If so, then the appellant, Mrs. Susan Moorhouse (there being no legitimate children left) is entitled, by the law of France,<sup>4</sup> to a share of the property of Dr. Cochrane, as being his acknowledged natural child.

*The Solicitor-General* (Sir R. Palmer) and Mr. Anderson (with whom were Mr. E. F. Smith, Mr. Morris, Mr. W. Pearson, Mr. Jackson, and Mr. Lord), for the several respondents, were not called on.<sup>5</sup>

March 19.

LORD CRANWORTH. — My Lords, this case has occupied your Lordships in a very full discussion four days, and having heard the address of two learned counsel at great length for the \* appellants, and having, with the concurrence of both my \* 281

<sup>1</sup> 6 H. & N. 733, 747.

<sup>2</sup> Not reported.

<sup>3</sup> 1 Hurl. & C. 31.

<sup>4</sup> Evidence of French advocates had been taken on this point.

<sup>5</sup> The arguments for the appellants concluded on the 16th March, just as the House was about to adjourn. The judgment was pronounced at the sitting of the House on the 19th March.

noble and learned friends who sat with me to hear the case, come to the conclusion that the judgment of the Vice-Chancellor was right *in omnibus*, we might perhaps have felt ourselves entirely justified in acting upon what used to be the practice of this House in similar cases, namely, that of saying simply that this House concurred in the judgment of the Court below without giving any reasons for the decision at which we have arrived. But as the case is one of considerable importance, and, in some respects, of novelty, I have thought it right to state shortly to your Lordships the grounds on which I have arrived at the same conclusion with the Vice-Chancellor. [His Lordship having very fully stated the grounds on which he believed that there had been no marriage between the testator and Raheem Beebee, and that no further inquiry would more thoroughly elicit the truth upon that matter, proceeded thus : ] I shall say very little on the other two points of the case, because they appear to me to be clear beyond the possibility of controversy. This testator was a Scotchman ; there is no doubt that his domicile of origin was Scotch. He went to India, and he acquired what we must, on the authorities, admit to be a different domicile from that which he had when he went there, namely, an Anglo-Indian or a Scoto-Indian domicile. He acquired that which, upon the authorities, is called an Anglo-Indian domicile, so that if he had died there, or had died before he had established himself anywhere else, his property would have been administered according to the law of England. But that he always intended, if he returned to Europe, to come back to Scotland, is, to my mind, perfectly clear. In one letter he says he does not think

he shall like the climate of the country ; but in another letter he says that his \* present notion is that he shall take a house in Edinburgh, and live in the country in the summer. But it is clear that he always contemplated that when he returned to Europe he should go to Scotland.

He returned *via* England. When he did go to Scotland he travelled about the country for nearly a year. His sister, who was occupying the old family house at Clippens, died in the year 1820. He then took possession of it, and to all intents and purposes resumed the domicile which he had before he started as a young man to India. I do not, my Lords, go into details, for they are really such as to render the question one that admits of no possible doubt. He seems to have been fond of society, and to have taken

pleasure in collecting quantities of wine, and numbers of Arab horses and brood mares. He built stables, and took a great interest throughout in Clippens. He entered into negotiations for the purchase of adjoining property, and was to all intents and purposes a domiciled Scotchman — re-domiciled, I should say, having resumed his domicile of origin. Did he leave Scotland? And why did he do so? He left Scotland partly with a view to educate his children; partly on account of his own health, finding, as he said, the climate of Scotland too cold and damp; partly, and it is suggested mainly, if not entirely, because of the conduct of his wife towards one of the servants — a man who certainly shows traces of education in his letters, but who either was or had been in the situation of a groom — which led to scandalous reports in the neighbourhood, and made his residence in Scotland, at Clippens, very uncomfortable. For all, or some, or one of these motives he quitted Clippens; he went first to Berne, where he sent his children to school at Hoffwyl for a few months, and went to Paris, and eventually established himself in a \* house or \* 283 apartments which he took unfurnished, and for which he got expensive furniture, meaning, if you please, to live there always. But then that does not change the domicile. In order to acquire a new domicile, according to an expression which I believe I used on a former occasion, and which I shall not shrink on that account from repeating, because I think it is a correct statement of the law, a man “must intend *quatenus in illo exuere patriam*.”<sup>1</sup> It is not enough that you merely mean to take another house in some other place, and that on account of your health, or for some other reason, you think it tolerably certain that you had better remain there all the days of your life. That does not signify; you do not lose your domicile of origin, or your resumed domicile, merely because you go to some other place that suits your health better, unless, indeed, you mean either on account of your health, or for some other motive, to cease to be a Scotchman and become an Englishman, or a Frenchman, or a German. In that case, if you give up every thing you left behind you, and establish yourself elsewhere, you may change your domicile. But it would be a most dangerous thing in this age, when persons are so much in the habit of going to a better climate on account of health, or to another country for a variety of reasons, for the education of their

<sup>1</sup> Whicker v. Hume, 7 H. L. Cas. 159.



children, or from caprice, or for enjoyment, to say that by going and living elsewhere, still retaining all your possessions here, and keeping up your house in the country, as this gentleman kept up his house at Clippens, you make yourself a foreigner instead of a native. It is quite clear that that is quite inconsistent with all the modern improved views of domicile.

\* 284 \* My Lords, without going into the case, I dispose of this part of the case by saying that in my opinion the appellants have wholly failed to make out any intention whatever on the part of Dr. Cochrane of abandoning his Scotch domicile. Then, my Lords, the question how his property would be distributed if he had acquired a French domicile does not arise.

The result is, that I cannot but think that the judgment of the Vice-Chancellor was perfectly right. I must further add that I think, especially with relation to the other matters, that this appeal ought never to have been brought, and that your Lordships ought to dismiss it, and to dismiss it with costs.

LORD CHELMSFORD. — I agree with my noble and learned friend who has just addressed your Lordships, on every point.

[His Lordship went very minutely into the evidence, and having disposed of the questions of fact, said :] I think that these observations exhaust the whole question upon the first head with regard to the Indian marriage and the refusal to grant a commission, in which I think the Vice-Chancellor is entirely right ; and I now proceed to the second question whether Dr. Cochrane had before his death acquired a domicile in France.

There is no doubt whatever that the domicile of origin in this case was Scotland ; that Dr. Cochrane afterwards acquired an Anglo-Indian domicile ; that he returned to this country from India in the year 1818 ; and that either in the year 1820, or some later period, he had resumed his domicile of origin in Scotland ; and the only question for your Lordships to determine here is, whether he ever abandoned that resumed domicile of origin, and acquired a new domicile in France. The difficulty of get-

\* 285 ting a \* satisfactory definition of domicile which will meet every case has often been admitted, and every attempt to frame one has hitherto failed. With every respect for the Vice-Chancellor's precision and accuracy of judgment, I cannot adopt the one which he proposes. The definition of an acquired domi-

cile which he suggests is, "The place in which a person has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something which is unexpected, or the happening of which is uncertain, shall occur to induce him to adopt some other permanent home."

My Lords, I pointed out, in the course of the argument, that this definition would reach the case of a person of delicate health going to a milder climate, with a determination to remain there until his health was completely restored, and that Lord Campbell, in *Johnstone v. Beattie*,<sup>1</sup> had put that very case as one in which an existing domicile could not be lost and a new one acquired.

The learned counsel for the appellants contended for a definition of domicile far less precise and exact than any which has ever been suggested. They argued that a domicile was acquired whenever a person went to reside in a place for an indefinite time.

Now, this definition and that of the Vice-Chancellor appear to me to be liable to exception, in omitting one important element, namely, a fixed intention of abandoning one domicile and permanently adopting another. The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any \* event, certain or uncertain, which might induce \* 286 him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been the deliberate choice of a permanent home.

In a question of change of domicile the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired. It may possibly be of such a description as to show an intention to abandon the former domicile; but that intention must be clearly and unequivocally proved. What was said by my noble and learned friend Lord Wensleydale in *Aikman v. Aikman*<sup>2</sup> lays down

<sup>1</sup> 10 Clark & F. 139.

<sup>2</sup> 3 Macq. Scotch App. 877.

the rule upon this subject very clearly: "Every man's domicile of origin" (and this is to be considered as a domicile of origin resumed) "must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts that change."

The difficulty in the way of the appellants is greater in this case, as they seek to supplant the resumed domicile of origin by a foreign domicile. I quite agree with what my noble and

\* 287 learned friend Lord Cranworth said in *\*Whicker v. Hume*:<sup>1</sup>

"You may much more easily suppose that a person, having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versâ*, than that he is quitting the United Kingdom, in order to make his permanent home where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists, and the conflict between the duties which you owe to one country and the duties which you owe to the other.

The question, therefore, which must first be determined is, whether Dr. Cochrane had purposely and actually abandoned his Scotch domicile with the intention never to return to it. If he had not, it is quite immaterial what was the character of his residence in France, for as long as his former domicile continued he could not acquire another which would supplant it.

In this view it is immaterial to ask what were the motives which induced Dr. Cochrane to quit Scotland. It may be assumed to be the most abiding motive of those to which his departure has been attributed; but I think with my noble and learned friend, that it is perfectly clear that he never intended to abandon, and never did abandon, his domicile of origin. He certainly had a great regard for Clippens, as his paternal home, and he seemed to have considered the establishment of a family of Cochranes of Clippens with some emotions of pride and satisfaction. Upon his departure for the Continent, where he expected, and where it was probable that he might remain for some time, he made very careful arrangements for keeping up the house and grounds at Clippens. He

gave instructions to Crow, the gardener, to take care to  
\* 288 keep the gardens \* and grounds in a proper state, and he

<sup>1</sup> 7 H. L. Cas. 124, 159.

also employed a person to look after the live animals, for which he seems to have had a very great regard. I lay no great stress upon the fact of the furniture having been packed up apparently for removal, which might be for its safe custody merely, or on the fact of his having sent his plate to the bankers at Paisley. But I do think it is a most important circumstance, that during the whole time of his residence in France he was constantly corresponding with Crow, the person who had been left in charge of the house and grounds, and giving him most minute instructions with regard to the mode in which the property was to be dealt with during his absence. That he contemplated a return to Clippens, and to make it the residence of his family, I think is also apparent, from his having negotiated for the purchase of two small farms, which he intended to throw into Clippens, and from his having entered into a contract for a neighbouring property called Ryaes, which he had actually agreed to purchase for 6000*l.*, the contract for which was completed after his death. Perhaps, also, it is not an unimportant circumstance to remark, that in his trust disposition of 1829 he describes himself as of Clippens. There are proved on this occasion, as there usually are in such cases, written and oral declarations which conflict with each other. I lay no great stress, as your Lordships probably would not incline to do, upon casual expressions of preference for one country over another at different periods. The feelings at the moment may dictate them, or the changing circumstances of life; even a change of weather, the difference between a bright and gloomy day, may make all the difference in the expressions of attachment to one place or to another; but I do lay very considerable stress upon declarations made to parties to whom he would be likely to reveal his intentions, \* those declarations not being \* 289 casual and occasional, but repeated from time to time, and evincing a strong determination to carry into effect the objects which he states.

Of course I am alluding here to the important depositions of the appellants, Mr. and Mrs. Moorhouse. We have the statements of both of them at a time when they had no interest whatever to misrepresent the matter one way or the other. Mr. Moorhouse says, "I had several conversations with the said Peter Cochrane on the occasion of my visiting him in Paris, in the year 1830, touching his intention to return to Scotland, and touching

his intention to reside permanently in Scotland, and also touching his residence at Paris. On each and every such occasion the said Peter Cochrane expressed himself as intending to return to Scotland, to make that his permanent place of abode. He spoke, I think, of adding two wings to his house at Clippens, and of various other improvements." He makes other declarations quite as forcible and strong, and he ends by saying, "My impression and belief, from what passed in conversation between me and the said Peter Cochrane, is, that the said Peter Cochrane intended to return to Scotland, and take up his permanent abode there, and that he did not intend to reside permanently at Paris, or at any other place in the kingdom of France." It was suggested by the counsel for the appellants, that all the declarations which Dr. Cochrane has made with regard to his return to Scotland, must be taken to have been made for the purpose of deceiving the persons to whom they were addressed, and that he really had no such intention; that he was disgusted with Scotland, and was determined to abandon it for ever. I do not think that that observation was applied to these particular depositions of the Moorhouses.

\* 290 \* At all events, if it had been, I do not think that it would be in the slightest degree applicable.

But, then, a period arrives when the Moorhouses have instituted their own suit, and when it becomes important for their own purposes to make out that there was a domicile acquired in France; and then, they being under examination on their own behalf, a question is put to them of an extraordinary and, I should venture to think, an irregular kind. After his stating some information he had received with regard to Pearson, and so on, this question is put: "Having obtained the additional information you did from the depositions in *Cochrane v. Cochrane*, and the subsequent information you received, did you retain the impression expressed in your depositions, that Dr. Cochrane intended to return to reside in Scotland?" That question ought not to have been allowed to be put; of course the answer might have been expected, "Certainly not; I considered he neither could nor would return to reside in Scotland."

This information might have erased the impressions from his mind which previous repeated conversations with Dr. Cochrane had made upon him. But it could not efface the conversations themselves; and your Lordships are not to consider in these cases

what is the impression of the witness, except he gives you the conversation from which his impression results. You are to consider for yourselves whether the declarations which are proved indicate an intention to return or to remain in the place where he was. Then, is it possible, I ask, to have stronger proof, coupled, of course, with all the other facts of the case, to show that Dr. Cochrane intended, that he had it in his mind and his heart, to return to Scotland, to live and probably to die there.

My Lords, I have suggested that, possibly, a residence \* in a foreign country, or in another place than the original \* 291 domicile, might be sufficient in itself to establish the fact of a change of domicile ; but in this case there is nothing whatever in the residence at Paris which shows in any way that there was a permanent intention in the mind of Dr. Cochrane to reside there. He takes apartments in the Boulevard des Capucines, and he afterwards takes a lease of apartments in the Place Vendôme for three years, but determinable at three months' notice, and he furnishes these apartments. There is nothing whatever in the character of this residence which can countervail all the other facts which indicate the intention of Dr. Cochrane to leave France at some future time, and to take up his abiding residence in Scotland. Under these circumstances, I quite agree with my noble and learned friend, that there can be no doubt in this case that Dr. Cochrane never intended to abandon, and never did in fact abandon, his domicile in Scotland.

Under all these circumstances, I consider that the Vice Chancellor has been right throughout, and that his decree ought to be affirmed, and that the appeal must be dismissed, and, I regret to add (as suggested by my noble and learned friend), with costs.

LORD KINGSDOWN. — My Lords, the opinions which your Lordships have expressed have entirely exhausted the subject, and I have only to express my concurrence in them, and in the most able and careful and satisfactory judgment in which the Vice-Chancellor in the Court below has explained the grounds of his decision.

Upon the question of domicile I would only wish to say this, that I apprehend that change of residence alone, however long and continued, does not effect a change of \* domicile, \* 292

as regulating the testamentary acts of the individual. It may be, and it is, a necessary ingredient; it may be, and it is, strong evidence of an intention to change the domicile, but unless, in addition to residence, there is intention to change the domicile—in my opinion no change of domicile is made—I think the distinction which has been taken by my noble and learned friend in the chair is a perfectly sound one. The same has been adverted to by Dr. Lushington in the case of *Hodgson v. De Beauchessne*.<sup>1</sup> A man must intend to become a Frenchman instead of an Englishman.<sup>2</sup> I can well imagine a case in which a man leaves England with no intention whatever of returning, and not only with no intention of returning, but with a determination and certainty that he will not return. Take the case of a man labouring under a mortal disease. He is informed by his physicians that his life may be prolonged for a few months by a change to a warmer climate—that at all events his suffering will be mitigated by such change. Is it to be said that if he goes out to Madeira he cannot do that without losing his character of an English subject, without losing the right to the intervention of the English laws as to the transmission of his property after his death, and the construction of his testamentary instruments. My Lords, I apprehend that such a proposition is revolting to common sense, and the common feelings of humanity.

I confess I should not have been sorry if advantage could have been taken of this case in order to express your Lordships' opinion upon some vexed points of the law of domicile, which it is highly desirable to have settled, and upon which I, at least, entertain very strong doubts; but as a difference of opinion has existed upon those subjects, and upon this case they do not necessarily or perhaps properly arise for your Lordships' determination, I think it better to abstain from expressing any opinion upon them. In this case itself, I think that in the application of any law, or any rule that has ever been established upon the subject of domicile, there cannot be the least doubt that this gentleman retained till his death his Scottish domicile.

<sup>1</sup> 12 Moore, P. C. C. 285.

<sup>2</sup> In *Udny v. Udny*, Law Rep. 1 H. L. Sc. 460, Lord Westbury said: "These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality, that is of natural allegiance."

Ordered, that the decree of the 12th June, 1860, and the order of the 19th April, 1861, be affirmed, and that the appeal be dismissed, and that the appellants do pay to the respondents the costs, &c.

Lords' Journals, 19th March, 1863.

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CROSSLEY v. DIXON.

1863. March 6, 13.

JOHN CROSSLEY and others, *Appellants*.

HENRY JACKES DIXON, *Respondent*.

*Patent. License. Validity. Form of Order.*

While a person is using, under a license, a patent machine and paying a royalty for its use, or the use of its principle embodied in any other machine, he cannot, in a proceeding against him for nonpayment of royalties in respect of the use of another machine alleged to embody the principle of the patent invention, set up as a defence that the patent is not valid. He can only be allowed to contend that the second machine does not embody the principle of the patent.

D. had verbally agreed with C. to be supplied by C. with machines constructed according to patents of which C. was the owner, and to pay royalties for the use of such machines, and for the use of any machines supplied to him by anybody else which embodied the principle of C.'s patents. D. was afterwards supplied by S. with machines, on the use of which C. claimed a royalty as embodying the principle in his patents, and he also charged D. with an infringement of the patents. D. defended himself against the claim, denying, first, that the agreement amounted to a license; secondly, that the patents were valid; thirdly, that there had been any infringement. The Vice-Chancellor made a decree in favour of C. \* directing an inquiry only on the ques- \* 294 tion of infringement. The Lords Justices retained the decree, but ordered the appeal to stand over till C. had brought "any action he might be advised":—

*Held*, that this order was erroneous; that the verbal agreement must be treated as a license; that D. while he continued to act under that license could not dispute the validity of the patents, and that, with a variation of some words in the Vice-Chancellor's order, it must be restored.

The Vice-Chancellor's order had declared that the defendant is not entitled to use any machine in the construction of which the plaintiffs' inventions, or inventions only colorably differing from them, would be employed without paying



the royalty, as if the carpet had been manufactured by a machine of the plaintiffs, &c. This order was varied by introducing before the words "is not entitled," these words, "whilst he continues to use the machines bought of the plaintiffs under the agreement," or "during the continuance of the agreement between the defendant and the plaintiffs."

THE appellants in August, 1860, filed their bill against the respondent, alleging that they were carpet manufacturers at Halifax, and were the owners of certain letters patent, granted from time to time for inventions applicable to the carpet manufacture, particularly such as were mentioned in the eighth paragraph of the bill; that they were accustomed, in consideration of the payment of a royalty, to grant licenses to different persons to work these patents, with all the improvements applied thereto by the plaintiffs themselves, and that they supplied, if required, such looms to their licensees; that the defendant was a carpet manufacturer at Kidderminster, and that after a correspondence (which was set forth in the bill) it was verbally agreed that the plaintiffs should grant to the defendant a license to use the plaintiffs' patent inventions, the subjects of the several letters patent mentioned in paragraph, and that the plaintiffs should supply looms to the defendant

on the terms in the bill stated, but the defendant was to  
 \* 295 \* be at liberty to have his looms made where he pleased provided that he paid the royalty to the plaintiffs. The eighth paragraph of the bill alleged that the patents therein mentioned were, by assignment or otherwise, the absolute property of the plaintiffs. The paragraph then gave a list of fifteen patents, among which were one by Hill, dated 11th February, 1843; one by Bigelow, 11th March, 1846; one by Crossley, and others, 28th September, 1850; one by Newton, 30th January, 1851, and one by Collier, 31st December, 1851. The plaintiffs supplied the defendant with looms to the number of forty-one. In December, 1854, there was a correspondence between them arising out of an offer by Sharpe & Co. to supply the defendant on more advantageous terms, in which offer Sharpe & Co. said, "we will guarantee the user of it against the cost of any action for infringement of any other patent." The bill then alleged that the defendant had purchased from Sharpe & Co. twenty-three looms, which they alleged to be infringements of several of the plaintiffs' patents. The bill then set forth some facts as evidence of this infringement, and alleged that Sharpe & Co. having supplied similar looms to a

Mr. Talbot, another of their licensees, the plaintiffs brought an action against him, which was referred, and in which the question was raised whether Sharpe's looms were an infringement of the plaintiffs' patents, and the arbitrator decided against Mr. Talbot. The bill charged that the defendant was a licensee of the plaintiffs, and that the looms supplied to him by Sharpe & Co. were infringements on the plaintiffs' patents, and it prayed it might be declared that the looms supplied by Sharpe & Co. to the defendant were constructed on the principle of the plaintiffs' inventions, and that the defendant was bound to account for the royalties due thereon, that if the Court should be \* of opinion that \* 296 the license did not extend to the looms purchased of Sharpe & Co., that then the defendant might be restrained from manufacturing any fabrics the subject of the plaintiffs' letters patent by means of the said looms, and that accounts might be directed, and for general relief.

The defendant in his answer denied that he was a licensee as alleged in the bill, and declared that no such license had ever been granted to him. He admitted that it was agreed that the plaintiffs should supply him with looms to make Brussels and velvet pile carpets, "but no specific mention was made of any alleged letters patent according to the specifications whereof such looms were to be constructed"; he denied any knowledge whether the letters patent mentioned in the eighth paragraph had been granted, or whether the plaintiffs were possessed of them. He admitted having been supplied with looms by the plaintiffs, and alleged that he could not say whether they were constructed according to the principle of the plaintiff's alleged inventions; he had paid the royalties due on the use of these looms; he admitted his having been supplied with eighteen looms by Sharpe & Co.; he could not tell from his own knowledge how they differed from the alleged patents of the plaintiffs, but he was convinced of the superiority of Sharpe's looms, and he alleged that they did not infringe the plaintiffs' patents, or any part thereof. He admitted that he had heard of the Talbot case, but he denied that Sharpe's looms were infringements of the plaintiffs' patent; and (paragraph 20), he submitted "to the Court whether the alleged letters patent of the plaintiffs, or any or either of them, are or is valid, and whether the several inventions which were the subject thereof respectively, were at the respective grants thereof new or useful; and I do not \* admit that \* 297

the said letters patent respectively, or any of them, are good and valid." In paragraph 23, he said, "I deny that I am acting under such license as in the said bill is alleged, and I submit that the agreement under which I purchased and make use of the looms so supplied by the plaintiffs extends to all carpets manufactured by looms which embody the invention embodied in the plaintiffs' said looms, so far as the plaintiffs are entitled to the exclusive use or application of such inventions, and whether such looms are or were constructed by the plaintiffs, or by any other person or persons." He denied (paragraph 24) that he owed any thing to the plaintiffs for royalties in respect of carpets manufactured by means of the looms of Sharpe & Co., and repeated his denial of the alleged infringement.

A motion was, on the 26th April, 1861, made by the appellants to restrain the respondent from manufacturing any fabrics the subject of the appellants' letters patent by means of the looms purchased of Sharpe & Co., or otherwise of infringing the appellants' letters patent. It was arranged that this motion for an injunction should be heard with the motion for a decree in the cause. On the 13th November, 1861, Vice-Chancellor Sir W. P. Wood made a decree, declaring that the defendant became accountable to the plaintiffs for the royalties agreed to be paid to the plaintiffs in respect of the user of the inventions secured, or purporting to be secured, by the letters patent; that the defendant was not entitled to use any machine in the construction of which the same inventions, or any of them, or any inventions only colourably differing therefrom, shall have been employed, without paying the royalty as if the carpet had been manufactured by a machine supplied by the plaintiffs. And his Honour directed inquiries, first,

\* 298 which of the inventions \* in the letters patent had been employed in the machines constructed by the appellants for the respondent, and, second, whether any of them had been used in the other machines supplied to the respondent. This decree was brought by appeal before the Lords Justices, who, on the 22d February, 1862, made an order "that the said appeal do stand over, with liberty for the plaintiffs within two months from the date hereof to bring such action or actions at law as they shall be advised; that the said decree is not to be given in evidence upon the trial of any such action."

This order was the subject of the present appeal.

*Sir Hugh Cairns* and *Mr. Cracknell*, for the appellants. — The order of the Lords Justices is bad in substance and in form. It proceeded on the supposition that while the respondent still continued a licensee under the appellants as patentees, he was at liberty to deny the validity of the patents which he had the license to use. That is erroneous. As long as he continued the licensee of the appellants, and was using their machines, or machines constructed on the principle embodied in the patents of which they were owners, he could not dispute the validity of those patents. The contract being proved, as it really was, not only by the evidence, but by the defendant's own answer, and being perfectly free from illegality, the Court of Chancery could not abdicate its functions, and send the parties to law to try the value of the consideration; it was bound to enforce that contract. The cases on this subject are all in one way, *Hall v. Conder*,<sup>1</sup> *Taylor v. Hare*,<sup>2</sup> *Lawes v. Pusaer*,<sup>3</sup> which is a very \* strong case, and *Noton* \* 299 *v. Brooks*.<sup>4</sup> [THE LORD CHANCELLOR. — The respondent admits his liability to pay on your machines, and on those, though made by other persons, which embody your inventions; but he denies that those made by Sharpe & Co. do embody your inventions. You assert that they do; then the only question for the Court is the identity of the two sets of machines.] That is so: the order of the Lords Justices is therefore bad in substance; it is also bad in form. It allowed the decree of the Vice-Chancellor to stand, and yet refused the appellants the benefit of it, but sent them at large, and without any specific object or purpose to law. If the decree was wrong, it ought to have been reversed, and the order ought to have specified exactly the nature of the inquiry which was to be tried at law.

The evidence proved the case of the appellants, and the only question that could properly be tried at law was, whether the looms supplied by Sharpe & Co. were or were not a user of the appellants' inventions? for the contract being established, and the respondent being shown to be a licensee of the appellants, he could only answer the claim for royalties on those looms by showing that they did not embody the inventions secured by the appellants' letters patent.

<sup>1</sup> 2 C. B. N. S. 22.

<sup>2</sup> 1 N. R. 260.

<sup>3</sup> 6 Ellis & B. 930.

<sup>4</sup> 7 H. & N. 499.

*Mr. Rolt* and *Mr. W. R. Fisher*, for the respondent. — Whether the appellants were entitled to the patents, and whether those patents were valid, are questions which are of the essence of such a contract as this, and no Court of Equity could enforce it without being satisfied that they possessed this right. The appellants can have no title to relief in equity, unless they have a title which the law would recognise as valid. If the respondent has entered into such an agreement as is here alleged, then the next question is, whether he has infringed the patent rights of the appellants? He cannot have done so, if they have no property in any valid patent. Then it must be decided whether their patents are valid. Now, that is a matter which has been assumed in this case, but which is wholly denied by the respondent. It was necessary to inquire into this very matter, and therefore a direction to proceed at law was required, for this case was before the Court previously to the Act of the last Session (25 & 26 Vict. c. 42), and the Court had not then the means or the power which it now possesses to determine questions of fact. In the bill a list of fifteen patents had been given, but none of them had been established at law. The present claim is in substance a proceeding as for an infringement of a patent; it is therefore essential to know whether the patent is valid. But then it is said that the respondent is estopped from disputing the validity of the patents, because he has entered into an agreement with the appellants to purchase machines made by them according to these patents. The question of estoppel in such a case is a question of law; it depends on the legal force of the agreement, and is properly to be decided in a Court of law. In that respect alone there is good ground for supporting the decree of the Lords Justices. In substance, therefore, they were right, and they were right too in matter in form, in not reversing the order of the Vice-Chancellor, for the result of the trial at law might possibly show that the patents were valid, and that there had been infringement, and if so, it would be necessary to apply the order. The order was, therefore, properly allowed to stand, but a trial at law was directed.

\* 301 \* From the first, *Sharpe & Co.* have denied the validity of the patents, and it is only now that the appellants have filed a bill against them to try that question. If *Sharpe's looms* are superior to those furnished by the appellants, are all men who have agreed to use the appellants' looms to be forbidden on that

account from using any others? They are not so forbidden if the patents held by the appellants are not valid, or if Sharpe's looms, supposing the patents to be valid, are not an infringement. On the statements in the bill there were four questions to be discussed. First, was there any, and if any, what agreement? Second, what was its legal effect? Third, if there was no estoppel by the legal effect of that agreement, were the patents valid? and, Fourth, if the patents were valid, had there been any infringement? No relief can be granted in equity till these questions are decided. The agreement was to buy a loom, and to pay a royalty for its use. The Vice-Chancellor's decree proceeded on the assumption that the appellant's claim could be supported in respect of any number of patents. That is an error. The appellants themselves only adhere to four out of the fifteen in the list which they originally gave. Throughout the claim, as put forward by the appellants, there are inconsistencies of fact; for example, in one place they speak of all Bigelow's patents: in the list itself there is but one which bears that name. Now that, and all other matters of that sort, are properly matters for inquiry before a jury, and therefore it was proper to direct that an action should be brought. As to the form of the action, the Lords Justices did not restrict the appellants to any one particular form; they might, perhaps, have complained if that had been done; it was not done, and they were left to bring "such action or actions as they \* might be advised." This gave them every advantage to \* 302 which they were entitled.

The cases cited on the other side do not affect the respondent. In *Noton v. Brooks*,<sup>1</sup> there was a license to use one particular patent. While the license existed, and was acted on, of course the validity of that individual patent could not be disputed. In that case reliance was placed on *Bowman v. Taylor*,<sup>2</sup> which was a case of estoppel, through a recital in the defendant's own deed, having executed which, he was of course not at liberty to contradict it. But where no such reason existed, as in *Hayne v. Maltby*,<sup>3</sup> the defendant was allowed to set up such a defence. In *Hall v. Conder*<sup>4</sup> the particulars of the patent were given, and the defendant's plea amounted to saying, that what he had bought was worthless. That is not in point with this case;

<sup>1</sup> 7 H. & N. 499.<sup>2</sup> 2 A. & E. 278.<sup>3</sup> 3 T. R. 438.<sup>4</sup> 2 C. B. N. S. 22.

and the same observation may be applied to *Taylor v. Hare*,<sup>1</sup> and *Lawes v. Purser*.<sup>2</sup>

The admissions in the answer as to liability to royalties affect only those looms of which the appellants are the owners, but not those of other persons which do not embody the same inventions, and the respondent has a right to show the distinction between them. [LORD KINGSDOWN. — The appellants say you have agreed to use their machines, and to pay for the use of them, and that, so long as you do so, you are not at liberty to impeach the validity of the patents under which they are made, that when you have put an end to the agreement, but not till then, you may  
\* 303 raise such dispute, for otherwise it would be to \* allow you to affirm and to disaffirm the validity of the patents at the same time.]

An agreement like that cannot operate as an absolute estoppel in the way now contended. In *Carpenter v. Buller*<sup>3</sup> it was decided that, even in the case of a deed, a party to it in an action not founded on the deed, but wholly collateral to it, might dispute the facts admitted in it. This is a proceeding collateral to the deed, for the respondent does not deny his liability to pay royalties for the machines supplied to him by the appellants under the deed, but they claim to make him collaterally liable to the same royalties in respect of other machines not supplied under the deed. In such a case he cannot be estopped by the deed from showing that he is not liable under it.

The appellants' counsel were not called on to reply.

THE LORD CHANCELLOR (LORD WESTBURY). — The case presented to your Lordships by the present appeal is one upon which I think you will agree with me, that no reasonable doubt can be entertained.

The appellants are the owners of divers patents granted for improvements in the manufacture of carpets. The respondent is a carpet manufacturer at Kidderminster. In the year 1854 the respondent applied to the appellants for the grant of a license to use their inventions. It was ultimately agreed, verbally, that certain machines should be prepared and made under the superintendence

<sup>1</sup> 1 N. R. 260.

<sup>3</sup> 8 M. & W. 209.

<sup>2</sup> 6 Ellis & B. 930.

of the appellants, embodying their inventions, and for which the respondent should pay ; and accordingly forty-two machines were manufactured, under the superintendence of the appellants, for the use of the respondent. \* The respondent paid for \* 304 those machines, and he also agreed to pay, and has paid, and is now paying, royalties for the use of the inventions embodied in those machines.

It is very material to observe, that the respondent bought the machines altogether. It is not a case, therefore, in which the appellants, being the owners of the machines, hired them out to the respondent, but it is a case in which he began the transaction by purchasing and paying for the machines that were prepared for him under the superintendence of the appellants. It consequently follows, that the royalties, which have been regularly paid *eo nomine* by the respondent, must of necessity have been paid by the one party, and received by the other, in respect of the right to use the patent inventions that were embodied in the machines so supplied.

That agreement subsists at the present moment, and the respondent is using the machines which he so bought, and is recognising his relation as licensee of the appellants by paying the appellants the royalty, a payment that can be attributed to nothing but to the patent rights in respect of which these machines have been constructed.

Now, the first contention on the part of the respondent is this, that, notwithstanding that relation continues, he is at liberty to deny the title of the appellants to the ownership of the inventions, for the use of which he is thus paying a royalty. We are all very well aware that that is a proposition inconsistent with the law, as it would be equally inconsistent with the ordinary reason and good sense of mankind. But, then, it appears that the respondent, being at liberty, in point of fact, under the agreement, to have made for him as many machines as he pleased, in conformity with the plaintiffs' patent, so long as he paid to the appellants a royalty for their use, has obtained from a different quarter other machines \* which are apparently, according to the evidence, \* 305 identical in construction and principle with the machines supplied to him by the appellants. And in respect of the user of these latter machines, it is contended, on the part of the respondent, that he is at liberty to affirm, that those machines are no invasion of the plaintiffs' patent ; first, because he denies the validity



of the patent ; and, secondly, because he affirms that the machines are different in construction and principle from the machines so made and supplied to him by the appellants.

Now, my Lords, assuming that the second set of machines is identical in construction with the first, it would be impossible to hold that the obligation not to deny the appellants' patent right would not extend to the second set of machines, so long as he continues to use the first set of machines, which is the fact at present. That, my Lords, is equally a question of law and a question of ordinary principle. It is a question upon which I apprehend your Lordships will have no doubt, namely, that the obligation to recognise and admit the validity of the patent right, of which the licensor has granted the use in the one case, extends also to the other set of machines, assuming them to be identical in point of construction.

Now, upon the subject of the identity of the two sets of machines, the whole of the evidence which has been adduced in the cause is in reality in favour of the proposition of the appellants. But that is a point upon which it is unnecessary for your Lordships to come to any conclusion, because that has been made the subject of an inquiry in the decree by the Vice-Chancellor. The only question of fact, therefore, namely, the identity of the two sets of machines, is made the subject of inquiry, and the rest of

the case resolves itself into a mere question of law, whether  
 \* 306 the licensee can deny the patent right of \* the licensor ? and, whether the obligation of the licensee not to dispute that right must not also extend to machines obtained by him from another quarter, which are constructed in violation of that patent right ?

I advert to this in the outset particularly with reference to the judgment upon which this case is brought by way of appeal, because if that question of law is a question admitting of no dispute, and if also there be no doubt or uncertainty with regard to the facts under which that question of law arises, there can be no reason for the alteration of the decree of the Vice-Chancellor, by sending the plaintiffs (that is, the present appellants) at large into a court of law.

I think that there must have been some misapprehension as to the facts of the case when it was before the Lords Justices, because I find, from the judgment of those learned Judges, that one of them says that he does not mean to give any opinion as to the validity

or the invalidity of the appellants' patent rights, a question, in fact, which could not by possibility arise, and which, the learned Judge would have seen in a moment, could not arise if he had been aware that the original agreement, in respect of the first set of machines, and in respect of the user of the invention embodied therein, was still in actual continuance as between the appellants and the respondent. And I find the other learned Judge speaking of the plaintiffs being at liberty to bring an action for an infringement, an observation that could not have been made if the learned Judge had been aware equally of the same fact. Because it is palpable that so long as the agreement made by the appellants with the respondent that the respondent shall be at liberty to use the inventions, paying certain royalties, continued, there is no limit to the extent of the respondent's user, and \*it would \*307 therefore have been impossible for them to bring an action for an infringement against the respondent. There could be no infringement pending the license. The license continues, and the extent of the remedy, therefore, can only be that which is sought by this bill, namely, an account of the royalties claimed by the appellants in respect of every machine used by the respondent, whencesoever derived, which embodies in it these inventions, in respect of which the agreement to pay royalty was originally made between the appellants and the respondent, and is now subsisting.

Therefore, my Lords, the law being clearly in favour of the plaintiffs (the present appellants), and the question of fact being one upon which, out of consideration for the defendant, the Vice-Chancellor directed an inquiry, I think your Lordships will concur with me in thinking that the judgment of the Lords Justices suspending the decree of the Vice-Chancellor, and sending the plaintiffs at large into a Court of law, is a judgment which is wholly inapplicable to the facts of the case when they are properly understood.

I have hardly anything more to detain your Lordships upon, except the observation that I think a greater amount of accuracy ought to have been introduced into the decree in one particular, although it was not made a subject of complaint by the appellants. You will observe that in the decree of the Vice-Chancellor there is a declaration that the defendant and his partners were not entitled, "and that defendant is not entitled to use any machine in the construction of which the same inventions, or any of them, or

any inventions, only colourably differing therefrom, shall have been employed without paying the same royalty, &c.” My Lords, the whole decree is of course founded upon the continuance of

\* 308 the \* existing relation of licensor and licensee. For it is an idle distinction which is attempted to be set up by the respondent that he made an agreement, and did not take a license. In the instruments, to which he is a party, made between himself and those persons who are defendants in the action at law, Sharpe, Stewart, & Co., he describes this very agreement as being a license. But that license being the foundation of the claim, and being of course determinable by the respondent at pleasure, if he chose to put an end to that license, it follows that the present appellants, if he continues to use the machines, must treat him only as a person infringing their patent right, and I would, therefore, submit to your Lordships that this general declaration, which is unlimited in point of time, and not confined to the duration of the license, ought to have been qualified by the introduction, after the words that “ the defendant is not entitled,” of some such words as these, “ whilst he continues to use the machines bought of the plaintiffs under the agreement, or during the continuance of the agreement between the defendant and the plaintiffs.” That alteration will, I think, limit the declaration under that decree within its proper confines. But that alteration ought not, as I humbly submit to your Lordships, to affect the question of costs.

Therefore I submit to your Lordships that the order of the Lords Justices ought to be discharged, and the petition of rehearing presented to the Lords Justices by the respondent dismissed with costs.

LORD CHELMSFORD. — My Lords, your Lordships are under the disadvantage in this case of not knowing exactly the reasons which induced the Lords Justices to come to the conclusion that the decree of the Vice-Chancellor ought to be suspended, \* 309 \* with liberty to the plaintiffs to bring such action as they might be advised ; but of course they must have been of opinion that the case was not ripe for such a decree as the Vice-Chancellor had pronounced. Whether their Lordships were right or wrong in that conclusion, must, of course, depend upon what was the nature of the question to be determined between the parties, and what was the evidence before the Vice-Chancellor upon the hearing.

Now it is unnecessary to consider very closely what was the exact character of the agreement between the parties: whether it was, as the plaintiffs allege, a grant of a license, or, as the defendant alleges, an agreement to use the looms to be supplied to the defendant, and the patent inventions embodied therein. It will be quite sufficient to take the admission of the defendant himself, as found in paragraphs fourteen and twenty-three of his answer. In the fourteenth paragraph he says, "I have since carried on, and am now carrying on, the said business, and have manufactured, and am now manufacturing, carpets by means of the said looms, supplied to my said late firm by the plaintiffs as aforesaid, and according to the principles of their alleged patent inventions, so far as their said looms embody the same, and also by means of looms purchased by my said late firm and by myself, and now used by me, of the said Messrs. Sharpe, Stewart, & Co." And in the twenty-third paragraph he denies that he is acting under such license, and he says, "I submit that the agreement, under which I purchased and make use of the looms so supplied by the plaintiffs as aforesaid, extends to all carpets manufactured by means of looms which embody the inventions embodied in the plaintiffs' said looms, so far as the plaintiffs are entitled to the exclusive use or application of such inventions, and whether such looms are or were constructed \* by the plaintiffs, or \* 310 by any other person or persons."

My Lords, the question, I apprehend, is not whether the defendant is at liberty to dispute the right of the plaintiffs to their patent inventions, but whether, being under an agreement to pay certain royalties for goods manufactured by the plaintiffs' looms, and any other looms embodying their inventions, he is, while that agreement is subsisting, at liberty to use those inventions, and to refuse to pay the royalties. I apprehend that he cannot do so. He cannot act under the agreement, and, at the same time, repudiate it. He may, if he pleases, put an end to the agreement, and he may use the machines which he has purchased from the plaintiffs; but he must do so at his peril; he must do so under the liability to be treated as an infringer, and to be subject to an action for damages for that infringement.

My Lords, that being the case, I apprehend that the only question which is in dispute between the parties is, whether the machines of Sharpe & Co., which are used by the defendant, are

identical with the machines which embody the patent inventions of the plaintiffs. Now, upon that subject the evidence is clear and conclusive, and it consists of a very few steps. It appears that there was a Mr. Talbot, who was the licensee of the plaintiffs' inventions, and who also used Sharpe & Co.'s machines. An action was brought against him by the plaintiffs for royalties in respect of the use of Sharpe & Co.'s machines. That action was referred to arbitration; and before the arbitrator a model was produced, which was proved to be an exact model of the machines of Sharpe & Co., which were used by Mr. Talbot, the defendant. An award was made against Mr. Talbot, and he was ordered to pay royalties to the amount of between 900*l.* and 1000*l.* Upon

\* 311 the hearing of this case before the Vice-Chancellor, \* that very model which had been produced before the arbitrator in the action against Mr. Talbot was again produced, and it was proved that it was a model of the machines of Sharpe & Co. which the defendant was using. And there was scientific evidence given to show that those machines of Sharpe & Co. were imitations of the plaintiffs' machines in several particulars. Now, to this evidence there was no answer whatever given. The defendant stated that he had not scientific knowledge sufficient to say whether Sharpe & Co.'s machines were in principle and in mode of operation similar to those of the plaintiffs; but he said that he was using those machines of Sharpe & Co. under the patent of a person of the name of Weild. Weild made an affidavit in the case; but he merely stated that the apparatus in his machines in one particular did not resemble the plaintiffs' patent machines, although it had been proved that in four or five different particulars Sharpe & Co.'s machines were similar to those of the plaintiffs.

But, my Lords, in addition to this, I think it becomes most important when we have to consider what is the evidence before the Vice-Chancellor, to look at the terms of those licenses that were granted by Sharpe & Co. to the defendant, because Sharpe & Co. are the real defendants in this case. Now in those licenses of Sharpe & Co. the defendant admits that he is working, under certain patent inventions, the property of Messrs. Crossley & Co., and he agrees to pay a certain royalty to Sharpe & Co. for the use of their machines so long as the plaintiffs continue to have the right under their patents, and it is also agreed that the amount of that royalty shall be diminished to the extent to which the plain-

tiffs from time to time may diminish the royalty payable by the defendant to them. Now, can it be doubted for one \* moment that here was ample evidence, evidence uncon- \* 312 tradicted, that there was an exact similarity between the machines of Sharpe & Co. and the machines of the plaintiffs?

I cannot, then, help thinking that that which was stated by the learned counsel for the appellants is perfectly correct; that they were entitled to a declaration by the Vice-Chancellor that there was this perfect resemblance between the machines, and that an account might be taken upon that footing without any inquiry. But the Vice-Chancellor, although he admitted that the evidence was very strong, if not conclusive, and was evidence which, he said, was uncontradicted, yet stated that he thought it would be safer (I think that was his expression) to direct an inquiry. Therefore an inquiry was directed; but it is an inquiry which the respondent certainly has no right to complain of, because it is one entirely for his benefit.

I therefore agree in the opinion which has been expressed by the noble and learned Lord on the Woolsack that the decree of the Lords Justices cannot be confirmed, and that the decree of the Vice-Chancellor must be affirmed, with the alteration which has been suggested by the noble and learned Lord.

LORD KINGSDOWN. — My Lords, I quite agree in the judgment which has been proposed, and I have nothing to add to the observations which have been made.

The following order was afterwards entered on the Journals:—

Ordered, that the order of the Lords Justices, of 22d February, 1862, be discharged, and that the decree \* of \* 313 Vice-Chancellor Wood, 13th November, 1861, be affirmed, with the following variation, viz. to insert after the words “and the defendant is not entitled,” the following words: “whilst he continues to use the machines bought of the plaintiffs under the agreement, or during the continuance of the agreement between the defendant and the plaintiffs”; and that the defendant’s petition of appeal to the Lords Justices be dismissed with costs. Cause remitted with these directions.

Lords’ Journals, 13th March, 1863.

ATKINSON v. HOLTBY.

1863. March 19, 23.

WILLIAM ATKINSON, *Appellant*.

JOHN HOLTBY, *Respondent*.<sup>1</sup>

*Will. Construction. Cross Remainders. Heir at Law. Practice.*

It is not a good rule in construing a will to consider what power would be, by a particular construction, given to a particular person, by the exercise of which he might be able to defeat what appears to be the general purpose of the will. A testator devised particular estates to the use of his daughter E. for life, remainder to her children, remainder to John, the elder son of another daughter F., for life; then to John's children; then to George, second son of F., for life; then to George's children; remainder to A., F., F. and E., the other children (daughters) of his daughter F., in equal shares; remainder to trustees to preserve, and remainder in equal shares to the children of his four granddaughters, and the heirs of their bodies, such children taking their mother's share as tenants in common in tail; remainder to the survivor of such children, in default of issue of granddaughters, over. He devised his residuary estates, in the same manner, to his daughter F., and then to John and George, as before, and then, "in default of such issue, to A., F., F. and E. for their lives, in equal shares; remainder to trustees to preserve the contingent remainders hereinafter limited; remainder in four equal shares to the children of my granddaughters, and the heirs of his, her, or their body, such children taking their mother's share as tenants in common in tail, remainder to the sur-  
 • 314 vivors or \*survivor, and the issue of their bodies in tail, in default of issue of my granddaughters," over.

*Held*, reversing a decision of the Lords Justices, and affirming that of the Master of the Rolls, that the granddaughters, and not their children, took estates tail with cross remainders between them, and that, consequently, all the granddaughters but one having died without issue, and that one having left a son and a daughter, the son was entitled to an estate in fee simple in seven-eighth parts of the estate, and the daughter to the remaining eighth part.

A question on the construction of a will of realty was raised in a partition suit between two persons claiming under a devise; the heir at law did not appear in the Court below, nor in this House:—

In pronouncing the decision, it was declared that that decision must be considered as pronounced without prejudice to any rights which the heir at law might claim to possess.

RICHARD NESS, of Pickering, in the county of York, made his will on the 15th April, 1799. He first gave certain specified es-

<sup>1</sup> *Watkins v. Frederick*, 11 H. L. Cas. 362; *Collingwood v. Stanhope*, Law Rep. 4 H. L. 48; *Sackville-West v. Holmesdale*, Law Rep. 4 H. L. 551.

tates to his daughter Elizabeth Ness for her life, then to William Mitchelson and Robert Kitching, to preserve contingent remainders after her death to the use of all her children, sons and daughters, "equally as tenants in common, and of the respective heirs of the bodies of all and any such children ; and if one or more of such child or children should die under twenty-one, and without issue, then his or her share to the use of the survivors, or others of them, share and share alike, as tenants in common, and of the respective heirs of the bodies of such survivors, &c. And if all such children but one shall happen to die under the said age, and without issue of their bodies, or there shall be only one such child, then to the use of such surviving or only child, and the heirs of his or her body. And for default of such issue, to the use of my daughter Faith Kirby for life," and from and after her decease to the use of the testator's grandson John Kirby, eldest son of

\* Faith Kirby, for life ; then to Mitchelson and Kitching, to \* 315 preserve, &c. ; then to the use, in like manner, of testator's grandson George, second son of Faith, for life ; then to Mitchelson and Kitching, to preserve, &c., with remainder to " the children of George, remainder to Ann, Fanny, Faith, and Elizabeth, the other children of my said daughter Faith, for their respective lives, in equal shares," remainder to Mitchelson and Kitching, to preserve, &c., " remainder in equal shares to the use of the children of my said four granddaughters, and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivors of such children ; and, in default of issue by my said granddaughters, I give all the same estates hereinafter devised to such persons as would be entitled to the same in case I had died intestate, and without issue. And I give and devise all and every other my lands, &c., not hereinbefore disposed of to my daughter Fanny during her life, and from and after her decease to my grandson John Kirby during his life " ; then to Mitchelson and Kitching, to preserve, &c. ; then " to the children of John Kirby equally as tenants in common, and to the heirs of their bodies, and if any should die under twenty-one, and without issue, to the survivors and the heirs of their bodies." In default, &c., a similar devise to the grandson George Kirby, and his children. " And for default of such issue, I give the same premises to the said Ann, Fanny, Faith, and Elizabeth, the other children of my said



daughter Faith, for their respective lives in equal shares," remainder to Mitchelson and Kitching, "to preserve the contingent remainders hereinafter limited; the remainder (in four equal shares) to the use of the children of my said granddaughters, and the heirs of their bodies, such children of my said grand-

\* 316 \* daughters taking their mother's share, as tenants in common in tail, remainder to the survivor or survivors of such children, and the issue of their, his, or her body in tail; and in default of issue by my said granddaughters, I give all the same estates last devised to my said daughter Elizabeth Ness during her life"; then to Mitchelson and Kitching to preserve; then to her children; and if all but one should die, then to the survivor; and if all should die, then to such persons as would have been entitled had the testator died intestate.

The testator died in 1799, leaving his two daughters Elizabeth and Faith him surviving. Elizabeth was married, but died without issue. Faith was married to Mr. Kirby, and had the two grandsons John and George, and the four granddaughters Ann, Fanny, Faith, and Elizabeth, mentioned in the will, all of whom were then alive. After the death of the testator two more granddaughters were born; they died unmarried. Ann Kirby, the eldest granddaughter, married William Atkinson, and had two children, William and Ann: she died in 1820. Mrs. Faith Kirby died in 1839. John Kirby died in 1847; Fanny Kirby in 1853; George Kirby and Faith Kirby in 1857, and Elizabeth Kirby in 1858; all without having been married. Ann Atkinson married William Barton. On the 28th February, 1861, the appellant filed his bill against his sister Ann (Mrs. Barton) and her husband, praying for a declaration of his rights under the will, and for a partition of the estates accordingly. Mr. Barton died, and Mrs. Barton appeared and put in an answer. The cause was heard before the Master of the Rolls, who on the 6th June, 1861, made a decree declaring that three fourths of the estates of the testator, as well those specifically devised as those limited to the children of the granddaughters, vested in the four granddaughters

\* 317 as tenants in common in \* tail, with cross remainders between them in tail; and that in the events which had happened the appellant was entitled to an estate in fee simple to seven-eighth parts of the said estates, and Mrs. Barton to the remaining

eighth part.<sup>1</sup> On appeal to the Lords Justices, this decree was varied, and the appellant and Mrs. Barton were declared entitled to equal moieties of the estates. Mrs. Barton died in December, 1861, having appointed the respondent her executor under her. The present appeal was then brought.

*The Solicitor-General (Sir R. Palmer)* and *Mr. Nalder*, for the appellant. — The four granddaughters took estates tail with cross remainders between them: no cross remainders can be implied with regard to the children of the granddaughters. The Lords Justices did so imply them, the chief reason given by Lord Justice Turner for his decision being, that “if estates tail in the granddaughters are to be implied, it would be in their power to prevent the shares of the estates limited to them and their children from going over to the children of the other granddaughters; and it would be in their power also to prevent the estates going over in entirety according to the ulterior limitation, and thus in both respects to defeat the plain intention of the will.” That reason is not sufficient to justify the decision, and is in truth opposed to the authorities. Where there is, as here, a plain expression of intention, the will must be construed without reference to the possible contingency of carrying that intention into effect, *Stanley v. Leonard*.<sup>2</sup> In *Lord Scarborough v. Savile*,<sup>3</sup> Lord Chief Justice Tindal \* expressly said in judgment: “We ought to disre- \* 318 gard altogether the legal consequences which may follow from the nature and qualities of the estate, where such estate is once collected from the words of the will itself.” The Master of the Rolls had rightly refused to imply cross remainders where, by a previous disposition, they had been expressly declared to arise in a different event, and he acted upon *Clache’s Case*,<sup>4</sup> recognized in, and not contradicted by, *Vanderplank v. King*,<sup>5</sup> and adopted in *Rabbeth v. Squire*.<sup>6</sup>

The words in this will, “in default of issue of my granddaughters,” mean a general failure of issue. The gift to Ann, Faith, Fanny, and Elizabeth, is a fourfold division, and carries the remainder in equal shares to them and the heirs of their respective bodies, so that the children of each granddaughter would take the

<sup>1</sup> 31 Beav. 272.

<sup>2</sup> 1 Eden, 87, 95, 96.

<sup>3</sup> 3 A. & E. 897, 963.

<sup>4</sup> Dyer, 330 b.

<sup>5</sup> 3 Hare, 1.

<sup>6</sup> 19 Beav. 77, 4 De G. & J. 406.

mother's share, but no more. In this will the word used is "child" or "children," and so used, it cannot be made to imply remoter issue, *Pride v. Fooks*; <sup>1</sup> and even as to the word "issue," it may be read as "heirs of the body," and the party seeking to give it a meaning other than that which it frequently bears, must show clearly from the context of the will that the testator so intended, *Roddy v. Fitzgerald*.<sup>2</sup> The effect of *Roe d. Wren v. Clayton*<sup>3</sup> is misapprehended by Mr. Jarman,<sup>4</sup> when he says "cross remainders were implied among several branches of issue by force of expressions referring to a preceding limitation to daughters in tail, among whom cross remainders were held to be implied,"

\* 319 for Lord Ellenborough \* expressly says<sup>5</sup> the testator intended all his estate to go over; "and this appearing to us to be the clear intention of the testator on the face of this will, it does not seem necessary to consider in what manner the issue of the several sisters would have taken among them," so that what Mr. Jarman speaks of as the decision, was expressly excluded from the consideration of the Court.

Cross remainders cannot here be implied among the children of the granddaughters; for if so, then children might take them during the lifetime of a mother, though they could not take an original remainder while their mother was alive. Lord Justice Turner noticed this objection, but did not answer it. *Ashley v. Ashley*<sup>6</sup> has no bearing on this matter.

*Clache's Case*,<sup>7</sup> which establishes that express cross remainders may exclude cross remainders by implication, is clearly in point here, and is not affected by the decision in *Vanderplank v. King*,<sup>8</sup> where all that the Vice-Chancellor did was, not to repel cross remainders as to one class merely because they were given among another class, but, without questioning the rule in *Clache's Case*, to proceed on the words of the particular will. Mr. Jarman appears to think<sup>9</sup> that the Vice-Chancellor thought that they might, as a general rule, be implied in such a case, and that *Clache's Case* was no authority to the contrary; but Mr. Jarman's recent editors say truly, that *Vanderplank v. King* "is clearly distin-

<sup>1</sup> 3 De G. & J. 252. See 28 Law J. N. S. Ch. 83 n.

<sup>2</sup> 6 H. L. Cas. 823.

<sup>3</sup> 6 East, 628.

<sup>4</sup> 2 Jarman, 518, 3d ed.

<sup>5</sup> 6 East, 635. See Sugd. Law of Prop. 284.

<sup>6</sup> 6 Sim. 358.

<sup>7</sup> Dyer, 330 b.

<sup>8</sup> 3 Hare, 1.

<sup>9</sup> 3d ed. vol. 3, p. 513.

guishable from *Clache's Case*, which has been recently followed by the Master of the Rolls and Lord Chelmsford in *Rabbeth v. Squire*.”<sup>1</sup> Here the testator has given to the children

\* of the granddaughters estates in the share of their par- \* 320  
ent, and as to that share cross remainders between them ;  
but cross remainders were not intended to take effect between all  
the children of all the granddaughters as to all the estates, —  
they were intended to apply only to the mother's share.

The case of *Doe d. Gallini v. Gallini*<sup>2</sup> is in point here. In that case the sons and daughters took only a life estate in the first instance, their children took estates tail, with cross remainders on the failure of issue of any of the sons and daughters, and the particular share of any was limited over to the survivors of the son and daughter.

*Goodright v. Dunham*,<sup>3</sup> and *Malcolm v. Taylor*,<sup>4</sup> were also cited, and so was *Doe v. Halley*,<sup>5</sup> with reference to the mode of construing a will where there appeared a general intent and a particular intent inconsistent with each other.

*Mr. Hobhouse* and *Mr. Wood*, for the respondent. — If the literal words of the will are taken, Mrs. Barton is entitled to one half of the estates by express gift ; if the general intention is referred to, she is equally entitled by necessary implication. Twice in the course of the specific devises the testator gives the estates in equal shares to the children of the granddaughters generally, as tenants in common ; and then, though in a shorter form of words, expresses the same intention as to the residue. The word used here is “ remainder,” and *Doe v. Burville*<sup>6</sup> shows that estates thus given in remainder, in the singular number, go over as a whole. Here “ remainder ” \* means the \* 321  
entirety of the estate in equal shares, the whole estate  
which had been given to Mitchelson and Kitching to preserve the contingent remainders. *Ashley v. Ashley*<sup>7</sup> is directly applicable here. That was a devise to A. for life, remainder to trustees to preserve, remainder to all the children of A. as tenants in common, and for want of such issue to B. (then repeating as to B.'s

<sup>1</sup> 19 Beav. 77, 4 De G. & J. 406.

<sup>2</sup> 5 B. & Ad. 621.

<sup>3</sup> 1 Dougl. 264.

<sup>4</sup> 2 Russ. & M. 416.

<sup>5</sup> 8 T. R. 5.

<sup>6</sup> 2 East, 47, n.

<sup>7</sup> 6 Sim. 358.

issue, the previous devise), and for want of such issue, to C. in fee, and it was held that the children of A. took estates for life, with cross remainders between them for life; and Vice-Chancellor Shadwell said, "the expression 'for want of such issue' means the want of issue whenever the event may happen, either by their being no child originally, or by the children ceasing to exist. These words seems to me to create cross remainders by implication." So here "such children" must mean all the children of all the granddaughters, and cross remainders are created as between them. Then the testator says such children are to take — they are to take their mother's share — then remainder to the survivors of such children, where again he means all, and the meaning of "survivors" is "the others"<sup>1</sup> — those who actually survive. Then he says, "in default of issue by my said granddaughters," which words introduce the gift over, and so express the failure of the particular limitation. *Roe v. Clayton*<sup>2</sup> shows that cross remainders may be implied amongst stocks, and also amongst the issue of stocks. That is so here. The object of the testator was equality between the various stocks and between the various members of these stocks. This is one prevailing

\* 322 \* principle of his will. Another is, that the existing generation should take only life estates, and should not be able to destroy the remainders. To give cross remainders among the granddaughters would entitle them to do so. That being so, cross remainders must be given only to those to whom the testator gave estates tail, namely, the granddaughters' children, and not to those to whom he only gave estates for life, namely, the granddaughters. The words "in default of such issue" must be construed as meaning the whole issue, and other words of the same sort are referential, Jarman on Wills.<sup>3</sup> The meaning is, that nothing shall go over as long as any issue of the granddaughters exist.

*Roddy v. Fitzgerald*<sup>4</sup> decided that an express gift to A. for life, with remainder to his issue, was equivalent to a gift to A. for life, and the heirs of his body; and that having got an estate tail by proper and express words of limitation, the Court would reject any problematical meaning of particular words which might have the result of affecting that estate. That case is perfectly inappli-

<sup>1</sup> See *Smith v. Osborne*, 6 H. L. Cas. 375.

<sup>2</sup> 6 East, 628.

<sup>3</sup> Vol. 2, p. 457.

<sup>4</sup> 6 H. L. Cas. 823.

cable here. Nor does *Doe d. Gallini v. Gallini*<sup>1</sup> resemble the present, for the decision there merely was that the son of the sons took estates tail instead of estates for life; and that was done because the testator had made unborn generations take estates for life which he could not do by law; and so, contrary to what was the plain intention of the testator, estates tail were implied in the elder generation, in order to prevent a total failure of the devise.

*Roe v. Clayton*<sup>2</sup> gets rid of the supposed difficulty in the case of the children of the granddaughters dying without issue while some of the granddaughters themselves are \* alive, \* 323 and establishes that there is no difficulty in making a double implication. The children of Ann, for example, might take an estate in one form, while Ann herself took an estate in another; they might succeed in tail to shares while she held her life estate. That case shows that when cross remainders may be implied, they may be implied between stirps, as well as between the issue of stirps. [LORD CHELMSFORD. — That was affirmed in this House.<sup>3</sup>] So *Clache's Case*<sup>4</sup> lays down no general rule applicable to the present, and in *Rabbeth v. Squire*<sup>5</sup> the testator himself had expressly and plainly declared in what cases cross remainders were to come into existence, and of course his express declarations were followed.

The case of *Vanderplank v. King*<sup>6</sup> shows distinctly that inequality of estates among devisees, some of them being tenants in tail and others tenants for life, with remainder to their issue in tail, is no objection to the implication of cross remainders among them. That case was much stronger than the present. It certainly did not follow *Clache's Case*, yet what was there done has never been impeached, and is applicable here.

*The Solicitor-General* replied. — It is not possible to raise cross remainders between the granddaughters and their children. They take entirely different estates. The phrase in the head note to *Vanderplank v. King*, "that the three children of A., who survived or left issue, took, according to their respective estates, the share of the child of A. who died without issue," is not warranted by any thing in the case; yet the reliance placed on it here must be founded on that phrase alone.

<sup>1</sup> 5 B. & Ad. 621.

<sup>2</sup> 6 East, 628.

<sup>3</sup> Nom. *Clayton v. Roe*, 1 Dow, 384.

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<sup>4</sup> Dyer, 330 b.

<sup>5</sup> 19 Beav. 77, 4 De G. & J. 406.

<sup>6</sup> 3 Hare, 1.

\* 324    \* LORD CRANWORTH. — My Lords, this is one of those cases which involves that with which all Courts are so much embarrassed from time to time, namely, the duty of putting a construction upon a will framed in very imperfect and inadequate language. In this case the Master of the Rolls has adopted one construction and the Lords Justices another. The appeal comes, therefore, from the Lords Justices to this House, and we have to say whether we think that the Lords Justices' view or that of the Master of the Rolls was correct.

I confess that I could have wished to adopt the view of the Lords Justices, because every one has a leaning towards equality of distribution; but it appears to me that it is impossible to come to any other conclusion than that the Master of the Rolls was right.

Before I state, very shortly, the reasons why I come to this conclusion, I wish to make one observation, although it may be an unnecessary act of precaution. The heir at law is not before this House, and has not been before either of the Courts below. In all probability he has no claim whatever. Such appears to have been the opinion of the Master of the Rolls and the Lords Justices; but it is proper, I think, that we should say that our decision does not prejudice any person who is not before this House, or was not before the Courts below. If he has any right, if it is a right paramount, it may be put in force hereafter. All that we have to decide, I think, is practically this. In the interposition of certain estates, in order to fill up something which we must call a gap in this will, are we to adopt one construction or the other? Are we to say that we are to interpose an estate tail in the granddaughters?

Or that (according to the views of the Lords Justices) we  
 \* 325 are to interpose an estate tail in the children \* of the granddaughters, each stirps having cross remainders between them.

Now, in the first place I call your Lordships' attention to the argument of Mr. Hobhouse upon the construction of this will. His first argument was, that these four granddaughters took estates for life as joint tenants; that they did not take estates each in a fourth, or, that taking estates each in a fourth, at all events there was a survivorship to them, so that each took an estate for her own life and the life of the survivor or survivors, and he argued that mainly upon the expression "with remainder." The whole

estates had been previously given by the testator to one of the grandsons who had issue. And then, as to the whole estate, the testator says, it is "with remainder to Ann, Fanny, Faith, and Elizabeth, the other children of my said daughter Faith, for their respective lives, in equal shares." Mr. Hobhouse contended that that means the whole estate. Then the will goes on, "remainder to the trustees to preserve the contingent remainders." Mr. Hobhouse's argument was, that these granddaughters took the estates amongst them, so that they were to go to the survivor or survivors, and that the whole estate went over to the trustees and their heirs, to preserve contingent remainders,—not one fourth to preserve the contingent remainder of Ann, and one fourth to preserve the contingent remainder of Fanny, and one fourth to preserve the contingent remainder of Elizabeth, but that the whole went over with that object.

My Lords, I cannot concur in that view of the case. I think it is as plain as language can make it, that these parties took estates as tenants in common, and that the remainder to the trustees to preserve in the strictest way, *reddendo singula singulis*, is to preserve the contingent remainders, remainder to Ann, Ann's, and to \* Fanny, Fanny's, and so on to each of the others; \* 326 it is exactly as if it had been remainder as to one fourth of the estate, to Ann, with limitation afterwards as to another fourth of the estate to Faith; and as to another fourth to Elizabeth, and so on. That, I think, can admit of no manner of doubt; and if there was a doubt up to the point of the will in which this disposition is made for the children or grandchildren, that disposition of itself puts it beyond all doubt; for the remainder there is given in equal shares to the use of the children of the granddaughters and the heirs of their bodies, such children of the granddaughters taking "their mother's share" as tenants in common. It is abundantly clear, therefore, that this is a gift, in default of issue of the sons, to the four granddaughters as tenants in common for life, each for her life; and upon the death of each, to the trustees and their heirs, during her life, to preserve contingent remainders, and the remainder, as to the share of each, to the use of her children as tenants in common in tail, remainder to the survivors or survivor of such children.

Now I agree with the view that was taken of this case, both by the Master of the Rolls and by the Lords Justices, that the "sur-



vivors of such children" must mean the survivors of the children of each class, the children of each grandchild.

Then comes the disposition which has given rise to the present question, "And in default of issue by my said granddaughters, I give all the same estates to such persons as would be entitled," so and so. What does that mean? When is that gift over to take effect? The Master of the Rolls used the words "such issue," — saying that we must fill up the gap that is created by that gift over

by interposing a gift as tenant in tail to those persons who  
 \*327 had previously taken only life estates, not an \*estate tail, which is to supersede the gift to the children, but (as in the case of *Gallini v. Gallini*) which is to come after the estate in remainder. The Lords Justices said, No, not so; we shall interpose an estate carrying the shares of each class, each stirps of children, over to every other stirps; so that eventually the same object may be effected by not letting the estate go over so long as any such issue remain. Lord Justice Turner, with his usual precision, puts the point very clearly thus. He says, "the estates there to be implied may be either estates tail in the granddaughters, with cross remainders between them, or estates tail in the children of the granddaughters, with cross remainders between such children, for either of such estates would effect the purpose to be accomplished."

By that I certainly understand his Lordship to mean, and by implication to say, that if either of those ways would not necessarily effect the object, that cannot be the right construction. It appears to me to be abundantly clear that the construction which is contended for by the respondent, namely, "estates tail in the children of the granddaughters, with cross remainders between such children," would not necessarily effect the object to be accomplished.

In the course of the arguments, I took the liberty of interrupting Mr. Hobhouse to point out what appeared to me to be an insuperable difficulty in that construction, namely, that if any of the granddaughters died, or supposing that they had all survived the prior estates for life in the parent and the brother, and one of them had come into possession, and then afterwards died without issue, what is to become of her share? I am assuming for the time that none of the others had any issue. There would have been  
 \*328 an intestacy. The object, therefore, of implying \*cross

remainders would have been defeated. Just the same would have happened if the only one of the granddaughters who had issue, Mrs. Atkinson, instead of dying in the lifetime of her three sisters, had survived them, and if her children had died in her lifetime, leaving issue; according to the construction of the Lords Justices, no object at all would have been effected.

It is upon these very short grounds that it appears to me that the construction which the Master of the Rolls put upon these words was the accurate construction, and that, consequently, what your Lordships are called upon to do is, to reverse the decree of the Lords Justices, and to restore the decision of the Master of the Rolls. I do not involve the case in any unnecessary disquisition as to any of the cases that have been cited, because the trite observation that the construction of any one will aids very little in the construction of another, is peculiarly applicable, as it appears to me, to this case. I abstain from doing so the more readily, because I observe that the Lords Justices do not rest their construction upon any authority which they consider as binding upon them; but on the contrary, they put their construction upon a general ground, treating the question simply with reference to the peculiar circumstances of this case. I therefore feel it my duty to move your Lordships to reverse the decree of the Lords Justices, and to remit the case, with a declaration that the construction put upon the case by the Master of the Rolls was correct.

LORD CHELMSFORD. — My Lords, because of the difference of opinion which has prevailed in this case, it is impossible not to feel that it is one of some difficulty; but, after the best consideration that I have been able to give to it, I have come to \* the conclusion that the Master of the Rolls was right in \* 329 the view which he adopted, and, consequently, that the decree of the Lords Justices cannot be supported.

The question here is, whether in the construction of a particular and residuary devise (for they are substantially the same) in a testator's will, after a limitation to the granddaughters for their respective lives in equal shares, the remainder in four equal shares, to the use of the children of the granddaughters and of the heirs of their bodies, such children of the granddaughters taking their mother's share as tenants in common in tail, with remainder to the survivor or survivors of such children, and the issue of their,

his, or her bodies in tail, the words following, "in default of issue by my said granddaughters," require an implication of an estate tail in the granddaughters, or in the children of the granddaughters, and in either case with cross remainders between them.

Up to a certain point, there is no difference between the learned Judges who have decided this case, and who have given reasons for their opinion. They agree that the proper reference of the word "such" in the clause "remainder to survivors of such children, and the issue of their, his, or her body in tail" is not to all the children of the granddaughters taken collectively, but to the children taking their mother's share.

The Master of the Rolls thought that this provided for cross remainders between the children of the granddaughters, and, therefore, that the rule laid down in *Clache's Case*, and the case of *Rabbeth v. Squire* prevented the implication of cross remainders between those same objects in different events, and that the words "in default of issue by my said granddaughters" must, therefore, upon the presumed intention of the testator,

\* 330 \* give an estate tail to the granddaughters, and not to their children.

I do not think it necessary to resort to those cases upon which the Master of the Rolls has founded his opinion, because some difficulty may be raised as to their application to the present case. But I think his Honour's conclusion may be supported upon other grounds. My mind has been very much impressed by the peculiar wording of the clause upon which the implication depends, and also by the consequences which might possibly result from the construction contended for by the respondents. The words to be construed are not "in default of such issue," which might create more difficulty, and which words certainly cannot be inserted in a limitation, but "in default of issue of my said granddaughters," which certainly point much more in the direction of an estate tail to be raised for the granddaughters than for their children.

In the choice between two conflicting implications, the effect of adopting one in preference to another must not be overlooked. If one would lead to unreasonable consequences and the other would avoid them, the latter implication has a presumption in its favour in an attempt to ascertain the probable intention of a testator. Now, the consequences of adopting the implication for which the respondent contends might be to let in the children of a grand-

daughter in the lifetime of their mother. Lord Justice Turner admits that this would be so, unless cross remainders were to be implied between the granddaughters also, "an implication," his Lordship says, "which certainly would be open to some difficulty; but," he adds, "having regard to the plain intent that the children of the granddaughters should take the inheritance, \*I think that little, if any, weight is due to this objection." \*331

My Lords, with very great deference, I must say, that not the plain, but the probable intent of the testator appears to me to be perfectly different; and I think that the construction adopted by the Master of the Rolls may be supported upon three different grounds. First, that the issue of the granddaughters, and not the issue of their children, are in terms pointed at by the clause in question; secondly, that the opposite construction would lead to unreasonable consequences, and would not, therefore, be likely to have been intended by the testator; and, thirdly, that the implication contended for by the respondent would not, as has been pointed out by my noble and learned friend, cover events which are extremely likely to arise.

The Lord Justice Turner considered that it was a circumstance adverse to the implication of an estate tail in the granddaughters, that "it would be in their power to prevent the shares of the estates limited to them and their children from going over to the children of the other granddaughters, and it would be in their power also to prevent the estates going over in entirety, according to the ulterior limitation, and thus, in both respects, to defeat the plain intention of the will." I think that the answer to those remarks is to be found in the observation of the Solicitor-General, in the reference to the case of *Stanley v. Lennard*,<sup>1</sup> and in the observations of Lord Chief Justice Tindal, in the case of *Lord Scarborough v. Savile*.<sup>2</sup>

Upon these various grounds I agree with my noble \*and learned friend, that the decree of the Lords Justices \*332 should be reversed, and that the decision of the Master of the Rolls should be affirmed.

LORD KINGSDOWN. — My Lords, I entirely concur in this conclusion. I have so great a respect for an opinion of the Lord Jus-

<sup>1</sup> 1 Eden, 87.

<sup>2</sup> 3 A. & E. 897, 963.

tice Turner, delivered after much consideration, that I cannot help entertaining some doubts, however confident my own opinion may be. But it appears to me that the Lord Justice, in this case, has founded himself mainly upon a principle which I cannot conceive to be consistent with the ordinary rules of law, namely, this ; he said, " I prefer the construction in favour of the issue of grandchildren upon this ground, that if you give an estate tail to the parents, the parents would be able to bar the estate tail, and defeat the issue altogether." That reasoning would apply to almost every case. As I observed in the course of the argument, if you enlarge an estate for life to the first taker, in order to let in all his issue, when you have done that, you enable the first taker to defeat, not only the issue specially named, but all the issue which is so let in. It seems to me, that the effect which has been mentioned to your Lordships would be very inconsistent, not only with the intention of the testator in cases which might be put, but also with the language which the testator has used in the will, " in default of issue by my said granddaughters," which point to estates tail in the grandchildren. It is upon that ground that I agree with the judgment which has been given by the Master of the Rolls. I am not much influenced by the difficulties which he felt as to *Clache's Case* and the others which he mentioned.

But, on the whole, with no other hesitation than that  
 \* 333 \* which arises from the circumstance which I have mentioned, I entirely concur in the decision which has been proposed by my noble and learned friends.

Decree of the Lords Justices reversed, with a declaration that the decree of the Master of the Rolls ought to have been affirmed.

Lords' Journals, 23d March, 1863.

ELLIOT v. NORTHEASTERN RAILWAY COMPANY.

1863. March 13, 17, 20, 24; April 24.

GEORGE ELLIOT, . . . . .	<i>Appellant.</i>
The DIRECTORS, &c. of the NORTHEASTERN RAIL- WAY COMPANY, . . . . .	} <i>Respondents.</i> <sup>1</sup>

*Railway. Subjacent and Adjacent Support. Mines. Grant of Land, Compulsory or Voluntary. Injunction, Form of. Costs.*

A deed of conveyance made under the authority of an Act of Parliament must be read as if the sections of the Act were incorporated in it. A conveyance granting land for a special purpose must be construed as conveying all the rights necessarily incident to the due execution of that purpose.

Whether the conveyance is a voluntary bargain between the parties, or is made because the Act gives the grantee the power of compelling a grant, these rules are applicable.

A railway bridge, though constructed in a more than ordinarily solid and weighty manner, and so requiring more than ordinary subjacent and adjacent supports, must be considered as something within the ordinary purposes of a railway.

A vendor of land, having sold it under an Act of Parliament for the particular purposes of a railway, cannot afterwards work the minerals under the surface (though they have been expressly reserved to him, either by his grant or by the provisions of the company's own Act), in such a manner as to prejudice the use of the land for the purposes for which it has been purchased. The common law right to adjacent support from the vendor's land attaches upon such a sale even beyond the limits of the purchased land.

After the passing of an Act which recited that it was expedient to make a railway, and that a bridge was to be thrown over a particular river, &c., A. sold (under the compulsory power in the Act) a portion of his land intended to be used as the foundation of one of the ends of the bridge. The Act itself expressly excepted all mines \* from the operation of the convey- \* 334  
ance, declared the landowner entitled to work the mines under the land not purchased, doing no damage to the railway, but it did not give the directors the power to compel a sale; on his approaching within twenty yards of the masonry, it required him to give notice to the directors, and then gave them the right to compel a sale of his interest in the mines within the twenty yards, but should they decline to purchase, allowed him to work the mines, doing no "avoidable damage":—

*Held*, that the introduction of these special provisions did not exclude the directors from the benefit, beyond the twenty yards, of the common law right,

<sup>1</sup> Great Western R. Co. v. Bennett, Law Rep. 2 H. L. 32.

existing in the purchaser of the surface, to adjacent support from the vendor's land.

An injunction granted in such a case to restrain the working of the mines, so as to take away this adjacent support, is not required to state the precise limits within which they may be worked.

In granting an injunction to prevent the working of mines, so as to occasion the removal of adjacent support to land purchased by a railway company, for the purposes of a railway, the Court below allowed the mine owner to drain a shaft, which, by the accidental overflowing of a neighbouring river, had, for years before and since the purchase, been filled with water. From this perpendicular shaft ran, horizontally, several passages or spaces, which had been filled with water from the same cause. The injunction forbade mining works which might injure the railway, but allowed the shaft to be drained. This House, adopting the opinion of the Court below, that the overflowing of the shaft was an accident which the railway company was not entitled to expect would for ever be allowed to exist without correction, varied the decree below by adding to the permission to drain the shaft, that of draining the horizontal passages or spaces.

The Court below, on the ground that this case involved matter which might properly be made the subject of litigation, gave no costs. This House did not disturb the order in that respect.

MR. J. C. BOULCOTT was the owner of certain land situate at Biddick, in the county of Durham, adjoining the river Wear. There were strata of coal under this land, and a coal mine had been worked there, but the work had been suspended for above forty years. At some distance from the river was a shaft, called

Haugh Shaft, from which ran several horizontal passages, \* 335 or \* "spaces," at different depths of the shaft. In these spaces were left pillars of coal which assisted in supporting the surface. The Wear, many years ago, overflowed its banks, and filled the shaft and the spaces with water.

In 1834 an Act was passed (4 Wm. 4, c. 57), under the authority of which a company called the "Durham Junction Railway Company" was formed, for the purpose of making a railway, one part of the line of which was to cross the Wear at Biddick.<sup>1</sup>

<sup>1</sup> The 12th section of that Act recited, that "whereas the said railway is intended to be carried over the River Wear, at or near to a place called Biddick, in the said county of Durham, by means of a bridge. And whereas it is expedient to provide against the injury that may be occasioned thereby to the free navigation of the said river." And then it was enacted that the company shall "build in proper manner a good, firm, and substantial bridge or viaduct of brick, stone, wood, or iron, or of all or any of those materials, over the said river, and that the piers of the said bridge or viaduct shall be placed in such situations, &c.,

\* In consequence of a report from engineers, the Durham Company (now represented by the respondents) pur- \* 336

as required by Sir John Reenie ; and that the spring of the arch shall commence at a point not less than thirty-five feet above the surface of the water, according to the low-water level."

The 27th enacted, "that nothing in this Act contained shall extend to give to the said company any coal, stone, slate, or other mineral under any lands, tenements, or hereditaments purchased by the company under the authority of this Act (except only so much of such stone, slate, or mineral as shall be necessary to be dug or carried away, or used for the purposes of this Act) ; but all such coal, stone, slate and mineral not necessary to be so dug, carried away, or used as aforesaid, shall be deemed to be excepted out of the purchase of such lands, tenements, and hereditaments, and may be worked by the respective owners and lessees of such coal, stone, slate, or mineral under the said lands, tenements, and hereditaments, or under the railway or other works of the said company, as if this Act had not been passed, so that no damage or obstruction be done or thereby occur to or in such railway or other works ; provided nevertheless, that in case any damage or obstruction shall be so done or occur to or in such railway or other works, the same shall forthwith be repaired or removed (as the same may require) by and at the expense of the respective owners or lessees of such coal, stone, slate, or mineral as aforesaid ; and if the same shall not forthwith be done, it shall be lawful for the said company to repair such damage, or to remove such obstruction, and to recover the expenses attending the same, in case of neglect or refusal to pay the same within twenty days after demand thereof, by distress and sale of the goods and chattels of such respective owners or lessees, or by action of debt," &c.

Section 28. "That whenever in the working or getting of any such coal, stone, slate or mineral, the owners or lessees thereof, or other persons working the same, shall approach within twenty yards of any masonry or building belonging to the said company, the person directing the working of any such coal, stone, slate, or mineral shall give notice in writing thereof to the said company, and within fourteen days after the service of such notice, the said company, or the directors of the said company, to be appointed as hereinafter mentioned, may deliver to such person a declaration in writing, under the common seal of the said company, that they require the coal, stone, slate, or mineral under such masonry or building so lying within twenty yards thereof (or so much thereof as shall be specified in the said declaration), to be reserved for the protection of such masonry or building, and in that case the said company shall purchase and pay the persons entitled to the same for the coal, stone, slate, or mineral so reserved ; and in case the said company and such person shall not agree as to the price to be paid for the said coal, stone, slate, or mineral so reserved, the same shall be settled by a jury (in manner hereinafter mentioned) ; and in case the said company or the said directors shall not deliver such declaration as hereinbefore mentioned, the said owners, lessees, or other persons may work and get the said coal, stone, slate, or mineral under the said masonry or buildings, provided the same be worked in the usual and ordinary manner of working mines, and that no avoidable damage be done to the said masonry or buildings."



chased, on the 20th May, 1837, a portion of Mr. Boulcott's land, consisting of about 7 acres and 1054 yards, and a bridge, called the Victoria Bridge, was built over the Wear, the abutments of one end of which rested on the purchased land. The bridge, stated to be a very fine structure, is at a great height above the \* 337 land, \* crosses the river at a single span, and from its great weight requires more support than would otherwise be required from the subjacent and adjacent ground.

In December, 1856, Boulcott granted a lease for forty-two years (the interest in which is now in the appellant), demising the mines underneath the land sold to the Durham Company in 1837, and in February, 1859, the appellant began some mining works near the bridge. Before beginning work, which was that of deepening and draining the Haugh Shaft, the appellant gave the respondents a notice (accompanied by a plan) of what he was about to do, showing that he intended to carry on mining operations under the railway, and he received from them a warning that he could not take away either the coal or the water from underneath their strip of purchased land, or of the land adjoining, without endangering the Victoria Bridge. For a time the appellant discontinued his works, but he afterwards resumed them, giving notice of his intention to do so.

On the 23d June, 1859, the respondents filed their bill, stating that the appellant had begun work with the view of pumping out the water from underneath the said piece of land, and that the support of the water (not only on account of hydrostatic pressure, but on account of the nature of the soil, which would shrink and fall in if the water was withdrawn) as well as the support of the coal underneath and adjoining to the said piece of land was necessary to the stability of the Victoria Bridge, and that great and irreparable damage would ensue to the respondents if the appellant should be allowed to continue his works. And the bill alleged that the appellant had knowledge of what would be the result of his works, and prayed that he might be restrained from tak- \* 338 ing away any of the water or coal from underneath \* the piece of land purchased from Boulcott, and from taking away any of the water or coal from the land adjoining thereto, which was necessary for the stability or security of the bridge.

The appellant put in his answer, stating that he did not desire to work the pillars of coal left at the former workings, and

undertook not to work the coal within such a distance as the company should deem a reasonable distance from the bridge, or the piece of purchased land, without giving ample notice. And he stated that he proposed to work the mine, as it might be worked, fairly, regularly, and orderly, according to the most approved course, method, and manner of working collieries in the Tyne and Wear districts.

Notice of motion was given for an injunction, which was agreed to be treated as a motion for a decree. On the argument, it was contended by the appellant that the respondents had no right to restrain him from working at a greater distance than twenty yards from any masonry on the piece of purchased land, as stipulated by the Durham Act, or than forty yards according to the Railway Clauses Consolidation Act, and he denied the alleged danger to the bridge. Evidence was taken on both sides, and the cause came on for hearing before Vice-Chancellor Wood, who, on the 22d June, 1860, pronounced a decree,<sup>1</sup> "That a perpetual injunction be awarded against the defendant, to restrain him, his servants, &c. from taking away any of the coal, stone, slate, or mineral from underneath the land purchased by the Durham Junction Railway Company from Boulcott, [or any land] within twenty yards of any masonry or buildings belonging to the company, or from otherwise working the mines \* under the land so purchased, or within such range of \* 339 twenty yards, in such a manner as to occasion any damage or obstruction to the railway or other works of the company, unless such notice shall have been first given by him as is required by the 28th section of the Act in the plaintiff's bill mentioned, and the company shall have neglected to deliver such declaration as in that section mentioned; and to restrain the defendant, &c. from working any of the minerals under or in the land adjoining to the land so purchased, and now the property of the company, and not being within twenty yards of any masonry or buildings belonging to the company, in such a manner as to affect the stability of the Victoria bridge, or the railway or other works in the respondents' bill mentioned. But this order is without prejudice to the appellant's right to pump out the water in the shaft, called the Haugh Shaft, the Court being of opinion that the appellant is entitled to drain the said shaft." On appeal, Lord Chancellor

<sup>1</sup> 1 Johns. & H. 145.

Campbell, on the 24th November, 1860, varied the order, by omitting the words printed between brackets, and he ordered the appellant to pay the costs of the appeal.<sup>1</sup> The present appeal was then brought.<sup>2</sup>

*Mr. Rolt* and *Mr. Dickinson* (*Mr. Hannen* was with them), for the appellant. — This decree is erroneous both in form and \* 340 in substance. \* In form it is wholly indefinite and vague.

It prohibits the appellant from working his mines not merely within twenty yards, the limit fixed by the company's private Act, or even within forty yards, as fixed by the Railway Clauses Consolidation Act, but from working "any of the minerals under or in the land adjoining to the land so purchased in such a manner as to affect the stability of the bridge." The Court ought to have declared the distance within which this working is prohibited; as it now stands, the appellant is practically forbidden to work any part of his minerals, for he cannot know the distance within which the Court might think his workings affected the stability of the bridge, and if, however careful he might be, he worked within that distance, he would not only be liable to make good all possible damage, but might besides subject himself to the penalties of a contempt of Court.

No reasonable cause of danger is shown here; and before an injunction like this can be asked for, the statement of the danger ought to be clear and precise. In *The Earl of Ripon v. Hobart*,<sup>3</sup> an application was made to restrain certain persons from doing an act by which it was expected that an increased body of water would be thrown into a river, from which it was believed that damage would arise to the banks of the river, and to some drainage works; but as the anticipated danger was not clearly pointed out, Lord Chancellor Brougham refused the injunction. So in *Haines v. Taylor*,<sup>4</sup> an injunction to prevent the erection of gas works, from which injury, not clearly shown to be imminent, was

<sup>1</sup> 2 De G., F. & J. 423.

<sup>2</sup> When the appeal first came on for hearing, Lord Westbury (Lord Chancellor) was present. His Lordship mentioned that he was a shareholder in the company, but was requested not to withdraw from the hearing of the appeal on that account. On the second day of the hearing his Lordship was absent on account of a domestic calamity, and the case was heard by Lord Chelmsford and Lord Kingsdown.

<sup>3</sup> 3 Mylne & K. 169.

<sup>4</sup> 10 Beav. 75, 2 Phill. 209.

apprehended, was refused. Again in *Cother v. The Midland Railway Company*,<sup>1</sup> \* an injunction to restrain a company \* 341 from taking more land than was necessary for the purposes of the line, had been granted in the Court below, but was dissolved on appeal, and there Lord Chancellor Cottenham made comments on the form of the injunction, which are exactly applicable here. His Lordship said, "The injunction only prohibits the company from doing what they have no authority to do, without informing them what are the limits of such authority. That is leaving the question between the parties undecided, but to be discussed on motion for a breach of the injunction. I do not believe that the Vice-Chancellor intended that the injunction should be in that form, for he decided the question ; and this appears to be a very objectionable form of order, and one of which I have taken frequent opportunities to express my disapprobation." Here the injunction is asked for on a vague apprehension of danger, and the decree which grants it does not decide the limits of the rights of the parties, but leaves that question open for future discussion. Even the permission reserved to the appellant to pump the water from the Haugh Shaft, leaves the matter in doubt, for if that should occasion injury to the bridge, the appellant would still be responsible.

The conveyance here on which the respondents rely, ought to receive a construction favourable to the rights of the appellant. It was not a voluntary conveyance — it was one made by the landowner, under the pressure of the compulsory powers granted by the Act of Parliament, in favour of the company. It is admitted that a man may not derogate from his own grant, but that rule can only be applied with strictness where the grant is voluntary. *Humphries v. Brogden*<sup>2</sup> no doubt lays down the doctrine that the owner of the surface is entitled \* of common right \* 342 to the support from the adjacent strata, but here the right claimed is much more extensive ; it is a right to support from the adjacent strata, and no limits are declared within which the enjoyment of that right is to be restrained. Now the effect of the provisions of the Durham Act was to reserve to the owner of the land the minerals under the surface, for the 27th section expressly provides that they shall not pass by the purchase made under that Act. If so, he must have the right to work them in a fair and

<sup>1</sup> 2 Phill. 469.<sup>2</sup> 12 Q. B. 739.

orderly manner, doing no avoidable injury to the railway, and he must have the right to work them up to that limit where the necessity to give notice to the company is declared by the Act. Of this right the decree deprives him. The respondents can have no rights as against the appellant but what their Act expressly gives them.

The case of *The Caledonian Railway Company v. Sprot*<sup>1</sup> does not govern the present, but is distinguishable from it. Lord Cranworth, who advised the House on that case, expressly drew the distinction between rights which existed at common law, and those which were conferred by special Act of Parliament; and Sprot had all the benefit of that distinction, though he had been one of the active promoters of the company. In *Fletcher v. The Great Western Railway Company*,<sup>2</sup> Lord Chief Baron Pollock observed that the 77th section of the Railway Clauses Act declares that mines shall be deemed to be exempted out of a conveyance, unless expressly named therein. Mr. Baron Martin repeated that statement, and observed that the case of *The Caledonian Company v. Sprot* turned not on the Act, but on the terms of "a conveyance regulating the rights of parties as between themselves;"

\*343 \*and Mr. Baron Watson remarked, that in *Sprot's Case* it did not appear that the company had the power, as in *Fletcher's Case*, to stop all mining whatever; and he added, that cases relating to common law rights had no application to cases like that, where the conveyance was entirely of a statutory nature. The minerals here are therefore reserved to the landowner; and three things may result therefrom: first, that the landowner will have the right of getting them without more regard to the surface than if the surface had remained his own, working only in a fair and reasonable manner; second, that he may disregard all title to support, except that which is necessary for the support of the ordinary surface of arable land. Neither of these need to be considered here. The third is, that he may disregard the surface, except so far as to leave it that degree of support which is necessary for the ordinary purposes of railway traffic. That would be left here by fair and ordinary working of the mines, and if the company, on account of the particular construction of this bridge requires more than this ordinary support, it must be made the sub-

<sup>1</sup> 2 Macq. Scotch App. 449.

<sup>2</sup> 4 H. & N. 242, affirmed in Ex. Ch., 5 H. & N. 689.

ject of special arrangement. What has been done here has been done under the provisions of the Company's Act. The provisions of the 28th section apply to coal under the land purchased, and within twenty yards of the masonry, and actually recognise the right to work such coal, under certain conditions. The protection to be given to the company is there defined, and the very definition implies that the owner has a property in the minerals, the working of which may, probably, endanger the masonry. The Legislature, therefore, recognises his right, declares him entitled to exercise it, gives the company the power to purchase it, but says that if it is not purchased, the minerals may be worked in the ordinary manner, no avoidable mischief \* being done. \* 344 Yet that might endanger the masonry. The Legislature has left that to be the subject of arrangement between the parties. Now there is no question here that the appellant will work the mines in the fair and ordinary manner, and will leave support for the ordinary purposes of the railway. The only difficulty here is, as to the bridge and masonry, which are of an extraordinary character. If more than ordinary support, and at a greater distance than twenty yards is required, it must be obtained under the provisions of the 28th section. The appellant is not bound to leave support for such works of an extraordinary character; and there is nothing to show that the Legislature made them the object of special protection.

As to the coal under the land purchased, it may be worked "under the railway or other works," so that no damage be thereby done. If damage should occur, the owner of the land must make it good. This section certainly gives no right to an injunction, and the words "other works" must refer to such works as are spoken of in the 28th section, and the appellant is entitled to work all up to the twenty yards, subject only to the provisions of the 27th section. The two sections must be read together. Where the words have been "no damage or destruction," as they were in the earlier Acts, they have been construed "no avoidable damage or destruction," *Dudley Canal Company v. Grazebrook*; <sup>1</sup> and there the mine-owner was held not to be responsible to a canal company for working his mines, after notice given to the company, even though such working produced actual injury to the company, and although the

<sup>1</sup> 1 B. & Ad. 59.

earlier sections of the Act in that case had declared that "there shall be no working under the canal, reservoir, &c. or  
 \* 345 \* within twelve yards thereof, except as hereinafter mentioned, without consent." There is no such strong restrictive expression in the present Act. That case is distinctly in point with the present. *The Stourbridge Canal Company v. Dudley*<sup>1</sup> is entirely to the same effect, and in that case the present decision was referred to, and brought under the attention of the Court. The rights of these parties do not depend on the common law, but are defined and restricted by the provisions of the Act.

The case of *The Northwestern Railway Company v. Ackroyd*<sup>2</sup> was decided after the passing of the General Railway Statutes. The company there had taken the right to make a tunnel. There was some dispute as to whether that was more than the purchase of an easement, but that was the only difference between that and the present case. It was there held, that the right to make the tunnel did not give the company such a right to support for the tunnel, that the grantor, acting only in accordance with the Railway Clauses Consolidation Act, sections 77, 78, could not work his mines under or adjoining to the tunnel; and there the Vice-Chancellor himself observed: "Even assuming it was not within the 77th section, in that view of the case the reasoning in *Fletcher v. The Great Western Railway Company* would, in fact, apply, because, after all, this is a compulsory purchase under a railway Act." *The Birmingham Canal Company v. Earl Dudley*,<sup>3</sup> and *The Birmingham Canal Company v. Swindell*,<sup>4</sup> there referred to, are to the same effect. The owner is entitled to work his  
 \* 346 mines, doing no damage; that is, no avoidable \* damage.

It is said that it is unreasonable to put such a construction on the Act, as it would leave the masonry and buildings liable to be destroyed, though there was no compulsory power given to enable the respondents to purchase them; but though they have not the power to compel a sale, they have the power to enter into an arrangement for one, and that affords them all the necessary protection. Of course, the Legislature, knowing from the plans that the bridge was to be erected, gave all the powers and rights which at that time were deemed necessary for its protection, and no others can now be implied.

<sup>1</sup> 30 Law J. N. S. Q. B. 108.

<sup>2</sup> 7 H. & N. 969.

<sup>3</sup> 8 Jur. N. S. 911.

<sup>4</sup> 7 H. & N. 980, n.

*Sir H. Cairns* and *Mr. Hobhouse* (*Mr. G. Williamson* was with them), for the respondents. — There are three questions in this case: first, what are the rights of the landowner and of the railway company with respect to the subjacent and the adjacent support of the railway? The respondents say, that the subjacent support having been purchased, the adjacent support is that to which they are entitled as a matter of law. The second question is, whether any act done or threatened by the landowner calls for any adjudication which would be included in the form of the bill. The third is, as to the form of the injunction granted by the Court. The second and third questions are comparatively unimportant; the first is that on which the decision most depends.

If the contention on the other side is correct, the adjoining landowner might cut the ground almost to the limit of the solid block on which the bridge is standing, and the respondents would have no power to prevent the mischief. That is not so; they are entitled by law to adjacent support. The twenty yards mentioned in the \* Act have no reference to adjacent, but only \* 347 to subjacent support. They refer to the land purchased by the company. The mines under that land do not pass by the conveyance; the owner may work them, but he must give notice, and the company may, if it pleases, compel him to sell his right of working them. If the company does not choose to purchase, he may work the mines, but he must work them in a certain manner, and do no avoidable damage; if he does, he must repair it. So far the company is protected. The Legislature never intended to leave it unprotected as to support extending beyond the twenty yards. Power was not given to the company to compel a sale of the minerals beyond that distance, but the owner was left to work them, subject, however, to this: that he was to do no damage, not merely no avoidable damage, but none whatever. This leaves the rights of the two parties as at common law, and at common law and equity, independent of prescription, the owner of the surface has a right to subjacent support, *Rogers v. Taylor*.<sup>1</sup> *Fletcher v. The Great Western Railway Company*<sup>2</sup> does not affect this case, for the question there depended on the Railway Clauses Consolidation Act; and in *The Northwestern Railway Company v. Ackroyd*,<sup>3</sup> merely shows that the mine-owner may not, by a sale of the sur-

<sup>1</sup> 2 H. & N. 828.<sup>3</sup> 8 Jur. N. S. 911.<sup>2</sup> 4 H. & N. 242.



face, lose the right to work the mines underneath ; and that where he has that right, it must be purchased from him. *The Dudley Canal Company v. Grazebrook*<sup>1</sup> was explained in the present case by Vice-Chancellor Wood, who showed that unless the clause in the

Act there was to be read "doing no damage that could be \* 348 avoided," no meaning whatever could be \* given to it.

Then came the cases of *The Birmingham Canal Company v. Dudley*,<sup>2</sup> and *The Stourbridge Canal Company v. Dudley*,<sup>3</sup> but they merely show that where the owner has a right to work mines under a canal, he may do so, even though damage may ensue. They do not touch the question of adjacent support. The case which is really like the present is that of *The Caledonian Company v. Sprot*,<sup>4</sup> and by that case the present must be decided. There the attempt to make the Railway Clauses Consolidation Act apply failed, and the judgment of Lord Cranworth establishes that where land is sold for the purposes of a railway, the incidents to such a purpose, one of which is the title to adjacent support, attach on the sale ; yet there Sprot had reserved to himself, as absolutely as the Railway Clauses Act could do, the right to the mines, and to win and work the minerals. That case was in substance reconsidered by this House in *The Caledonian Company v. Belhaven*,<sup>5</sup> and the same doctrine was affirmed. A man cannot derogate from his own grant, and here, in fact, the respondents are dealing with Boulcott, from whom they purchased the land, and on whose behalf it is now contended that he possesses the right to strip down the land he retains, so as to have the land purchased by the respondents and the buildings upon it without any adjacent support. The compulsory power to purchase support may negative the common-law right to that support, but where no such power exists, and none exists here, that right remains, and attaches itself to the grant of the land which is purchased. The fact that the land was purchased under the Act, and not in the way of ordinary \* 349 bargain, makes no difference in that \* matter, *Humphries v. Brogden*.<sup>6</sup> *Roberts v. Haines*<sup>7</sup> is decisive to show that the purchaser of the surface is entitled to support from the subjacent strata, and the right to adjacent support is in the judgment

<sup>1</sup> 1 B. & Ad. 59.

<sup>2</sup> 7 H. & N. 969.

<sup>3</sup> 30 Law J. N. S. Q. B. 108.

<sup>4</sup> 6 Ellis & B. 643, affirmed in 7 Ellis & B. 625.

<sup>5</sup> 2 Macq. Scotch App. 449.

<sup>6</sup> 3 Macq. Scotch App. 56.

<sup>7</sup> 12 Q. B. 739.

there shown to be one which exists at common law, and which cannot be taken away, except by express stipulation. In this case there was no such stipulation. Undoubtedly the right to the mines belongs to the appellant, but he must work them, subject to that common-law right of the owner of the surface to adjacent support which has not been in any manner taken away.

Then as to the decree. There was here a proper case for adjudication and for the interference of the Court. The respondents were entitled to ask for protection against a probable, if not an imminent danger; they were not bound to wait for the actual occurrence of the mischief which might have been irreparable.

As to withdrawing the water from the spaces, the evidence shows that it may be necessary for the mines, but it does not show that it will not be dangerous for the railway works. The water in the spaces ought therefore to be left.

The form of the order here is right. It is impossible for the company to fix the exact limits at which the working may become dangerous. It is sufficient to declare the principle, and leave the parties practically to apply it. The Court does not, in practice, say what a party may, but what he may not do, and before he is committed for contempt, if there should be any doubt upon the facts, a trial would be ordered. Such an injunction as this may be granted, *Imperial Gas Company v. Broadbent*<sup>1</sup>; \* *Ripon v. Hobart*<sup>2</sup>; *Haines v. Taylor*<sup>3</sup>; *Cother v.* \* 350 *The Midland Railway Company*<sup>4</sup> are not applicable here, for in each of them the alleged cause for asking for the injunction was altogether problematical. *The Northeastern Railway Company v. Crossland*<sup>5</sup> is a distinct precedent for this form of injunction, and that case went before the Lords Justices, who sustained what had been done in the Court below.

*Mr. Rolt*, in reply. — There can be no question as to common-law rights, when the rights and powers of the company have been so carefully made the subject of legislative provision. All that was necessary for the protection of the company has been introduced into the respondents' Act, and must be taken to have been

<sup>1</sup> 7 De G., M. & G. 436, on appeal, 7 H. L. Cas. 600.

<sup>3</sup> Mylne & K. 189.

<sup>2</sup> Phill. 209.

<sup>4</sup> 2 Phill. 469.

<sup>5</sup> 2 Johns. & H. 565.

introduced by them and to have been deemed sufficient for their purposes. The appellant has the right, by their own Act, to work the minerals in any way he pleases, till he comes within twenty yards of the masonry or buildings, when he must give notice to the respondents, who have the right to compel a sale. This is sufficient for their protection, and there is no room for implying any thing else in their favour. *The Caledonian Company v. Sprot* does not govern this case. Every Court of law has, since its decision, acted on it as a case applicable to a voluntary but not to a compulsory conveyance; but besides that, it is clear that what is sold under the authority of an Act of Parliament, is what is expressed in that act, nothing more; here it is sought to add some-

thing more. [LORD KINGSDOWN. — Neither the facts nor \* 351 the provisions of the Act are set out in that \* case. What were they?] It was the case of an action for damages at the instance of Sprot; the summons recited the Act and the conveyance, and alleged that he had not agreed to part with the minerals; that there was a valuable fire clay under the surface, and that the surface itself was of small value; and he prayed for a declaration that the company had no right of property in the minerals, but that they belonged to him, subject to any right in the company, to purchase them under the Act; that the company had no power to prevent him from working the minerals unless by paying for the same, and that the provision in the Act by which it was declared that he could not be allowed to work the minerals without previously giving security against doing damage, did not in any respect apply to the minerals in the land adjoining the railway which was not included in the sale, and that notwithstanding the Act he was entitled to work these minerals, or to have compensation from the defendants. There is no such provision in this case, and the difference between the two is highly important, for here it is the right of the respondents which is defined and limited, while there it was the right of the pursuer, which was subject to statutory restriction. Then as to the Railway Clauses Act and the other statutes of the same kind, it is clear that they declare that the right to support is within the limits of a definite area, and there is no ground for extending that right beyond those limits. The right to purchase defines and restricts the right to support. Here it is twenty yards and no more; the Parliamentary right is expressly declared and it excludes any common-law right.

The injunction allows the right to drain the shaft, but that cannot be done without draining the spaces, which is not allowed to the appellant. The result is, that if he worked the minerals even at half a mile off, at a lower \* level, and the spaces \* 352 were thereby drained, he would be liable. Against that, at all events, the appellant is entitled to be protected. But, beyond that, the injunction which proceeds on the ground of giving the respondents a common-law right, to which by the terms of their own Act they are not entitled, cannot be supported.

LORD CHELMSFORD. — My Lords, during the opening of this case on the part of the appellant, I felt considerable doubt whether the injunction could be maintained to the full extent to which it had been granted ; but having carefully considered the able arguments addressed to your Lordships by the counsel on both sides, I am now satisfied that the decree appealed from may, with some modification, be generally affirmed.

The appellant is the lessee of the mines in question for the term of forty-two years, under a lease of the 21st December, 1856, granted by Mr. Boulcott, who was the proprietor of the mines in 1834, when the Act for making what is now the respondents' railway was passed. Under this Act the company was empowered to carry the railway over the river Wear, at or near to a place called Biddick, by means of a bridge or viaduct. For the purpose of constructing this bridge and a portion of the railway, the company required some of the land of Mr. Boulcott, under which there were seams of coal ; and he agreed to sell the requisite quantity of land for the sum of 650*l*.

It seems to me not very important to consider whether this transaction is to be regarded in the light of a voluntary or a compulsory sale. As the company could have compelled Mr. Boulcott to part with his land for the purpose \* of the Act, \* 353 the latter would probably be the more correct view.

The conveyance to the company was made in the form prescribed by the Act, and must be read as if the sections applicable to the subject matter of the grant and its incidents were inserted in it. These sections, the 27th and the 28th, contain provisions for the case of mines lying under lands purchased by the company with the authority of the Act. These mines, whether of coal, stone, slate, or other mineral, are, by the 27th section, to be

deemed to be excepted out of the purchase of such lands, and may be worked by the respective owners under the lands, or under the railway or other works of the company, as if the Act had not been passed, "so that no damage or obstruction be done or thereby occur to or in such railway or other works." The 28th section relates to masonry and building belonging to the company, and enacts, that whenever, in working such coal, &c. (which refers to coal, &c. previously mentioned as being under the land purchased) the working shall approach within twenty yards of any masonry or building, notice shall be given by the owner or lessee of the mines, and the company may deliver a declaration that it requires the coal to be reserved for the protection of such masonry or building, and in that case the company shall purchase and pay for the coal so reserved; and in case the company shall not deliver such declaration, the owners, &c. "may work or get the coal under the masonry or buildings, provided the same be worked in the usual and ordinary manner of working mines, and that no avoidable damage be done to the said masonry or building."

The appellant contends that the 27th section must be interpreted by the 28th, and that the meaning of the two sections, \* 354 taken together, is, that the company is entitled, \* by the 28th section, to purchase a limited amount of support, and can claim nothing more, and that beyond this limit the appellant is only bound to work his mines in such a manner as to leave sufficient support for the ordinary purposes of the railway, but not for any extraordinary works.

The two sections, however, appear to me to be independent of each other. By the 27th section the owners of mines under lands purchased by the company are required to work them "so that no damage be done or thereby occur to the railway or other works." This is not an unreasonable restriction. Throughout the line in general it is probable that no great additional weight will be laid upon the surface, and therefore that, in the course of working the coals in the ordinary manner, no difficulty will be found in preventing damage to the railway. But if it should turn out that the coal cannot be worked in the usual and ordinary manner without occasioning damage, then to permit it to be even so worked would be to defeat the object for which alone the surface land was taken from the owner, and would make the very Act which authorised the construction of the railway the sanction for its destruction.

The Legislature having thus, in the 27th section, provided generally against all damage by working mines under the purchased land, proceeds, in the 28th section, to deal with the special case of masonry and buildings belonging to the company, with a view to the protection both of the company and the mine owner. As a great additional weight must be laid upon the surface by works of this description, necessarily requiring a greater amount of support than would be afforded in the ordinary mode of working mines, it seems but fair that the company should pay for this extraordinary support, which can only be \* obtained by depriv- \* 355 ing the owner of a quantity of his coal, which he would otherwise have been able to work. The 28th section, therefore, enables the company to purchase the requisite protection to the masonry and buildings; and, should the company decline to do so, permits the mine-owner to remove all the coal which he would be able to get in the usual and ordinary manner of working, and if in so working damage is unavoidable, the company must bear the consequences.

The Act thus provides for the rights of the mine-owner, and of the company as far as the purchased lands extend. But the injunction which has been granted restrains the appellant from working, not only under the purchased lands, but also "under or in the land adjoining to the land so purchased in such a manner as to affect the stability of the Victoria Bridge, or the railway or other works." And the appellant contends that the company having secured by the Act a certain amount of support to the masonry and buildings, and also within the limits of the purchased lands what may be necessary for the ordinary purposes of the railway, its rights are defined by the Act, and the rule of the common law with regard to lateral support from adjacent lands is altogether excluded.

But this argument appears to me to be answered by the decision of this House in the case of *The Caledonian Company v. Sprot*.<sup>1</sup> There the Act contained a clause making it competent to the proprietor whose lands were authorised to be taken to reserve from the bargain and sale to the company the whole minerals in the lands for his own proper use and behoof, but restraining him from working the minerals till he had given security \* for injury which might thence in any way result to the \* 356

<sup>1</sup> 2 Macq. Scotch App. 449.

undertaking. The conveyance of Mr. Sprot to the company contained a reservation of the minerals under the land conveyed, and may be considered as equivalent to the exception of the minerals by the Act itself; and Lord Cranworth, then Lord Chancellor, in advising the House, said, "Independently of any Parliamentary enactment, the effect of the conveyance was to convey the land, to be covered by the railway, to the company, together with a right to all reasonable subjacent and adjacent support; a right to such support being a right necessarily connected with the subject matter of the grant."

It was said by the appellant's counsel that this case has generally been considered to have proceeded upon the ground of the conveyance being voluntary. I have already observed that in these cases of private arrangement, where the owner may be compelled to part with his property, the sale can hardly be regarded as a voluntary one. But whether voluntary or compulsory, every grant must carry with it all that is necessary to the enjoyment of the subject matter of it; and, therefore, if a certain amount of lateral support is essential to the safety of the railway, the right to it must pass as a necessary incident to the grant.

But the learned counsel for the appellant insisted that even if he was bound to leave this lateral support for the ordinary purposes of the railway, he was not called upon to provide for extraordinary support, such as bridges, &c. But this objection seems to be met by my noble and learned friend, Lord Cranworth, in the case to which I have just referred. After observing that "how far adjacent support must stand, is a question in which each particular case will depend on its own special circumstances," he adds, "It must further be observed, that all which a

\* 357 \* grantor can reasonably be considered to grant or warrant is, such a measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant was made." Now Mr. Boulcott must have known where it was proposed to carry the bridge over the river Wear, and that some of his land would be used as a support to the abutments of the bridge. He must be taken, therefore, to have impliedly granted all the adjacent support necessary to maintain these abutments. It is incorrect to speak of the bridge as an extraordinary work in connection with the railway. It is a necessary part of the line of

railway, without which it could not have been made, and it comes rather within the meaning of the words "ordinary purposes of the railway"; for which it is conceded that support within the limits of the purchased lands must be provided.

These, then, were the respective rights and obligations of the parties when the appellant's notice of his intention to work the mines was given. This notice, with the plan accompanying it, informed the company that the appellant's mining operations would extend in every direction, not only near to but even under the railway itself. The company therefore filed a bill, praying for an injunction, and the defendant's answer shows the extent to which he claimed the right to work the mines. He says, "the company is not entitled to have any further or other support left to the ground or surface of the strip or portion of land so purchased, as in the plaintiff's bill mentioned, than such as would be left according to the fair, regular, and orderly, and best and most improved course, method, and manner of working collieries on the rivers Tyne and Wear." And what consequences he anticipated might possibly occur from this mode of working, \* may be \* 358 collected from another passage in his answer, in which after stating his inability to say whether the water as well as the coal underneath and adjoining the piece of land purchased, is or is not necessary to the stability of the Victoria Bridge, or whether great damage will or will not ensue to the plaintiffs if he is allowed to resume his works, he submits, "That such damage would not be irreparable, as it would simply consist of pecuniary loss or expense, as the railway might be carried across the river Wear by a bridge not requiring so much support as the Victoria Bridge." So that he contemplates nothing less than the possibility of the entire destruction of the bridge as the consequence of his operations.

The appellant complains that the injunction was granted without any proof being offered that damage would result from the removal of the coal, the evidence being almost wholly directed to show that the support of the water was necessary to the stability of the bridge. To this I think a satisfactory answer was given by the counsel for the respondents. The only question really in dispute between the parties was, the right to the support afforded by the water. There was never any doubt as to the necessity of the support from the coal. And if the respondents would have abandoned their claim to the water support (which was afterwards



decided against them) they might, perhaps, have asked for an injunction upon the admissions contained in the defendant's answer.

But it is said that, even assuming it to be right to restrain the appellant from working his mines so as to damage the railway, the injunction which has been granted is so general and indefinite that the appellant is deterred from commencing any operations in his mines, however distant from the railway and works, lest he

should be guilty of a breach of the injunction, and render \* 359 himself liable to \* an attachment. The appellant seemed to think that the form of the injunction adopted on this occasion was entirely new. We have, however, been referred to *The Northeastern Railway Company v. Crossland*,<sup>1</sup> in which an injunction in the same extensive and indefinite terms was granted. It is difficult, indeed, to see how adequate protection can be given in any other way. It was suggested that the injunction ought to have defined, by metes and bounds, the limits within which workings were to be prohibited. But this is altogether impracticable, because it is not possible to determine beforehand to what extent the workings may deprive the railway and works of the adjacent support, which of right they ought to have. Nor need the appellant entertain much apprehension of the consequences of this injunction upon his future operation. He must know that it amounts merely to a declaration of the Court upon the question of right which he himself, as he says in his answer, desired "to afford an opportunity of having properly tried."

One part of the injunction, however, will require some qualification or explanation, to prevent the appellant receiving a detriment to which he ought not to be exposed. When the bill was filed, the main contention between the parties was, whether the respondents were entitled to have the water left in the Haugh Shaft, as by its pressure on the water in the spaces of the old workings of the mine, it afforded an additional support to the surface land. The Court decided that the appellant is entitled to drain this shaft, though the consequence will necessarily be, that the support of the bridge will be thereby diminished. This decision apparently \* 360 ly proceeded \* on the ground that the filling of the Haugh Shaft was the result of an accident; and, it being reasonable to expect at some future time, that the owner would resume

<sup>1</sup> 2 Johns. & H. 565.

the working of the seams of coal to which it led, and would use the shaft for the purpose, the respondents had no right to speculate on the water being always left in the shaft. But why had they any more right to speculate on the continuance of a circumstance equally accidental; the water constantly remaining in the spaces? And if the operation of working coal, not in the pillars, but in other and deeper seams, will have, as it appears it may have, the effect of draining off the water in the spaces, why had the respondents any more right to count upon the continuance of the accidental state of circumstances in the spaces than in the shaft?

I therefore submit to your Lordships that the decree ought to be varied by adding these words, "and this injunction is not to restrain the defendant from withdrawing the water from the spaces left in the old works if such effect should be produced by working the colliery in a proper manner, and in the usual manner of working mines in the district where the same is situated." And that with this addition the decree ought to be affirmed.

With respect to costs, I submit that there should be no costs of this appeal on either side; and as the question of the right to support from the water in the spaces does not appear to have been made the ground of the defendant's appeal to the Lord Chancellor, that his decree as to costs ought not to be varied.

LORD KINGSDOWN. — My Lords, in the year 1834 the respondents, or a company which they now represent, were authorised and \* required for the purposes of their railway \* 361 to build a bridge over the Wear. They proposed to build this bridge at a part of the river where, on one side of the stream, there were, at a considerable depth below the surface, the workings of a colliery which had for some years been abandoned. The workings had been conducted in the usual manner, by getting out portions of the coal, leaving other portions of the mineral standing as pillars to support the roof.

It seems that at a distance of about two hundred yards from the line of railway, there was an old shaft communicating with the abandoned colliery, by which shaft the coal had been drawn up. An overflow of the river, or some occurrence had taken place in which the water of the river had poured down the shaft and filled not only the shaft itself, but the interstices between the pillars left

for the support of the roof. And it is obvious that by the pressure of the water in the shaft upon the water in these interstices, considerable support would be afforded to the roof in addition to that supplied by the pillars.

In this state of things the company having taken advice as to the sufficiency of the ground (though to a certain extent undermined) to support the proposed bridge, purchased from Mr. Boulcott, the owner, a portion of land for the site of the bridge, together with a strip of land of some length leading up to it, and proceeded to make the railway and to erect the bridge on the land so purchased. This bridge is said to be of unusual solidity, to be of more than the ordinary weight of such structures, and to require, therefore, more than the ordinary amount of support. The bridge, however, was built in conformity with the provisions of the Act of Parliament; and for more than twenty years no attempt was made by Mr. Boulcott, or those claiming under him,

\* 362 \* to disturb the supports of the bridge as they existed at the time when it was built.

The question then is, what are the rights which the respondents would have acquired against Mr. Boulcott by the conveyance from him, if the purchase had been made by private bargain, and the conveyance had reserved to the vendor the right to the minerals under the land sold? I apprehend that, upon the authorities, there can be no doubt that Mr. Boulcott having sold the land for the bridge and the railway, could not so use the property which he had reserved, either the minerals under the land sold or the surface of, or minerals under the adjoining land, as to prejudice the use of that which he had granted for the purpose for which it was known to have been granted. He could not have taken away either from under the land sold or from the adjoining land, minerals, the abstraction of which would have the effect of interrupting the railway or endangering the bridge.

That this would be so at common law in the case of a private contract was not disputed; but it was said that the law is different when a compulsory sale is made under an Act of Parliament, in which case it was argued that the purchaser takes nothing but what the Act of Parliament gives in terms. It is extremely difficult to understand what difference there can be for this purpose, between the effect of a conveyance when the contract is entered into under the authority of an Act of Parliament and when it is

made by private bargain. In either case the conveyance must pass the property described in the deed with its legal incidents. There may, indeed, be, either in the conveyance or in the Act of Parliament, provisions which exclude from the conveyance of the land its ordinary legal incidents, but unless something to \* this effect can be shown, the ordinary legal incidents will \* 363 attach to the land.

The real question, therefore, is, does the conveyance in this case, or does the Act under which it was made, contain any thing which excludes the operation of the ordinary rule of law? The appellant represents Mr. Boulcott, and can assert no rights which Mr. Boulcott could not have maintained. It is not suggested that there is any thing special in the terms of the conveyance, but the provisions of the Act of Parliament are relied on.

Let the matter be considered first under the 27th section. That section applies only to minerals reserved, that is, to minerals under the sold land; and so far from containing any thing contrary to the common-law right, it expressly recognises and enforces it; for it provides that the minerals may be got by the owner, so that no damage or obstruction be thereby caused to the railway or works; and that if any damage shall be done, and the owner shall not repair it, the company may charge the expense on the owner. Does this recognition of the common-law right to subjacent support afford any inference of an intention to exclude the common-law right to lateral support? I can see no foundation for any such inference. But this question seems to me to be settled by the decision of your Lordships in *Sprot's Case*. There can be no doubt that the operation of this clause will extend to the bridge as well as the other works of the railway, unless by the effect of the 28th section the bridge is excluded from the protection which is afforded to other portions of the railway not consisting of masonry or building.

The 28th section, like the 27th, is confined to minerals worked under the sold lands, and it has nothing to do with lateral support — I mean with support to be afforded \* to the land \* 364 sold by the adjoining land. Section 28 seems to me intended to give an additional protection in certain cases to the railway company. The personal remedy against the miner given by the former clause would often be very insufficient, where buildings, possibly of great value, like the bridge in this case, might be

destroyed by working. The person guilty of the destruction might very probably be quite unable to answer in damages for the injury which he had caused ; and the injury might, in many cases, be of a character for which pecuniary damages would afford no adequate compensation. Therefore, when the workings approached within such a distance of buildings as, in the opinion of the Legislature, was likely to endanger them, it gave the railway company the right of purchasing the minerals, either immediately under the buildings, or within twenty yards of them. Which is the true construction is for the present purpose immaterial. The owner being compelled to sell, at a fair price, nothing could be more reasonable than that, if the railway company refused to purchase, the owner should be at liberty to get the minerals in a workmanlike manner ; and that if he did no damage to the railway beyond that which was unavoidable, he should be relieved from all responsibility. When the absolute right to the minerals was reserved to the owner, he was to work at his own peril. When his right was qualified by the option given to the company, to the purchaser, then if the company preferred the risk of damage to the expense of purchase, it was to be subjected to the risk which it refused to buy off. There is nothing, as it seems to me, but what is perfectly just and reasonable in these provisions, which are in no degree inconsistent with each other.

The result is, that in this Act of Parliament there is  
 \* 365 \* nothing, in my opinion, to exclude the ordinary right of a purchaser to such support of the land which he has bought, both subjacent and adjacent, as the common-law of the land gives him.

The other objections made to the decree remain to be considered.

When the facts of the case are understood, it is impossible to say that there was no danger threatened which warranted the interposition of the Court. It appears by the plan annexed to the notice, that the appellant intended to work, and insisted on the right to work, the coal left in the old working ; and he now contends that he has a right to do so, whatever may be the effect upon the bridge or the other works of the railway, provided he works in a proper manner, and does no damage which can be avoided. He has challenged the company to a contest upon this point ; and the injunction awarded is the necessary consequence of the decision. It is, in fact, as was justly stated by the respondents' counsel, the

decision of the Court, and equivalent only in substance to a declaration of right.

With regard to the form of the injunction, I confess that I agree with my noble and learned friend in thinking that as to the water it is too extensive. The Court has decided that the appellant is entitled to withdraw the water from the shaft; and to this decision the respondents have submitted. Upon this principle, I do not understand why he is to be held obliged to retain the water in the spaces. I agree in the propriety of the qualification of the decree proposed by my noble and learned friend.

Decree and order affirmed, with the following addition :

\* “That this injunction is not to restrain the defendant \* 366 from withdrawing the water from the spaces left in the old workings, if such effect should be produced by working the colliery in a proper manner, and in the usual manner of working mines in the district where the same is situated.”

Lords' Journals, 24th April, 1863.

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\* WALSH v. SECRETARY OF STATE FOR INDIA. \* 367

1863. May 15, 18, 19, 21.

SIR J. B. WALSH, Bart., . . . . . *Appellant.*  
Her Majesty's SECRETARY OF STATE FOR INDIA and }  
the ATTORNEY-GENERAL, . . . . . } *Respondents.*

*Covenant. Statute. Trust. Clive Fund.*

In 1770 a deed was executed between Lord Clive and the directors, &c. of the East India Company by which Lord Clive transferred to the directors a sum of money to be employed in giving pensions to disabled officers and soldiers and their widows, his declared object being thereby to induce fit persons to enter the company's service, and to encourage them to bravery therein. The directors and their successors were to be perpetual trustees of the fund. In the deed was a covenant to the effect, that if after 1784 the company should cease to employ a military force in India, in the actual pay and service of the company, and ships for carrying on the company's trade, then the company would, subject to the annuities already payable out of the said fund, repay the money to Lord Clive or his representatives. In 1833, an Act of Parlia-

ment passed to put an end to the company's trading, and after April, 1834, ships were no longer employed by the company. In 1858 another Act transferred the government of India from the company to the Crown, and likewise transferred the army of the company to the service of her Majesty. The same Act vested in her Majesty all the funds at the disposal of the company, and bound her Majesty by all the obligations of the company, fiduciary or otherwise : —

*Held*, reversing the decision of the Court below, that the covenant in the deed was a private covenant between Lord Clive and the company ; that such a covenant could only be affected by a direct enactment ; that the statutes in question did not so affect this covenant ; that the objects of the original trust, namely, troops in the pay and service of the company, had ceased to exist ; that the covenant had thereupon come into operation, and therefore that the fund, subject to the charges already fixed upon it, had become payable to Lord Clive's representatives.

IN the year 1770 a deed was executed between the directors and others forming the East India Company of the one part, and Robert Lord Clive of the other part. This deed recited that Meer Mahomed Jaffer Cawn, deceased, late Nabob of Bengal, had bequeathed to Lord Clive, in money and jewels, property to the value of five lacs of rupees (62,833*l.* 6*s.* 8*d.*) ; that in the \* 368 course of \* 1766 Lord Clive had paid this sum into the company's treasury at Calcutta, and had received company's notes for the same, bearing interest at eight per cent. ; that Lord Clive being zealous for the prosperity of the company, its territories and trade, all of which greatly depended on the bravery and conduct of the company's troops, and considering that the establishment for such of the officers and men, employed in the company's service, as should be disabled by age, war, or disease contracted during their service, would induce fit persons to enter into the service, and encourage the bravery of the soldiery employed therein, had proposed to the directors of the company to appropriate the interest of the five lacs of rupees for the support of a certain number of officers, non-commissioned officers, and privates, who from wounds, length of service, or diseases contracted during their service, were unfit to serve any longer, and whose fortunes might be too scanty to afford the officers a decent, and the private men a comfortable, subsistence in their native country, and also to make some provision for the widows of such officers and private men as should have been entitled to the said bounty, or should have lost their lives in the company's service ; and that Syeff Ud Dowla had

given to the directors three lacs of rupees (37,700*l.*) in addition to the above fund, receiving the company's notes for that sum at eight per cent. interest, and made payable to Lord Clive; that Lord Clive had desired to make the directors, and their successors, perpetual trustees of the two funds, which trust the directors had accepted; and it was agreed between them that the eight lacs of rupees, and the interest (which then amounted to 24,128*l.*) should, from the 29th September, 1766, carry interest at eight per cent., and be applied for the trusts thereafter mentioned. The trusts were set forth, and then came certain provisoes. That the directors \* and company covenanted that if they should \* 369 at any time thereafter, by any means otherwise than by the fate of war, be dispossessed of their territorial possessions in Bengal, and the revenues arising thereby, so that the jaghire granted to Lord Clive should cease to be paid to him or his assigns, or in case they should at any time before 1784 cease to employ and maintain in their immediate pay and service a military force in the East Indies, they should forthwith pay to Lord Clive, or his assigns, the five lacs of rupees, but subject, with the interest on the three lacs, in the proportions which the two sums bore to each other, to the payment of all such pensions and annuities as should, at the time of either contingency, happen to be payable out of the said trust fund, which pensions and annuities should continue during the lives of the persons then entitled thereto. And if after the year 1784 it should so happen that the directors and company should have no military force in their actual pay or service in the East Indies, then the interest and produce of the eight lacs should be applied, &c. towards the support, relief, and provision of the marine officers and seamen who should become invalids, or superannuated in their service, and the widows of such of them as should die in their service, in such shares and proportions as should be agreed on between the directors and Lord Clive; and they covenanted that if, after the commencement of 1784, they should "cease to employ a military force in their actual pay and service in the East Indies, and also ships for carrying on their trade and commerce, then, and in such case, as soon as the said event shall happen, they shall pay unto Lord Clive, his executors, &c. for his and their own use, at the treasury at Calcutta, the full sum of five lacs of sicca rupees, but subject, with the interest of the three lacs of rupees, in the proportion the \* said sums \* 370



bear to each other, to the payment of all such pensions and annuities, for the lives of the persons then entitled thereto only, as shall, at the time such event shall happen, be payable out of or chargeable upon the said trust fund, according to the true intent and meaning of those presents." What was called "the Clive Fund" was thus established. Lord Clive died in 1774.

In 1833, an Act of Parliament was passed "for effecting an arrangement with the East India Company, and for the better government of his Majesty's East Indian territories, till the 30th day of April, 1854." It enacted that the East India Company should, with all convenient speed, close its commercial business, which accordingly ceased from April, 1834, from which time the company had ceased to employ any ships for carrying on trade and commerce. In 1858, another Act was passed "for the better government of India," by which all sovereign and territorial rights were taken away from the company and vested in her Majesty.<sup>1</sup>

<sup>1</sup> The Act of 1858, 21 & 22 Vict. c. 106, contained, among others, the following provisions: Sec. 39. "All lands, hereditaments, moneys, stores, goods, chattels, and other real and personal estate of the company, subject to the debts and liabilities affecting the same respectively, and the benefit of all contracts, covenants, and engagements, and all rights to fines, &c., and all other emoluments of the company," except the stock and dividend, "shall become vested in her Majesty, to be applied and disposed of, subject to the provisions of this Act, for the purposes of the government of India."

Sec. 42 declared that the dividend and all territorial debt, "and all other debts of the company, and all sums of money, costs, charges, and expenses which, if this Act had not been passed, would have been payable by the company out of the revenues of India, by reason of any treaties, contracts, grants, or liabilities, shall be charged and chargeable upon the revenues of India alone, as if this Act had not been passed . . . and all other moneys vested in, or arising or accruing from, property or rights vested in her Majesty under this Act, or to be received or disposed of by the council under this Act, shall be applied in aid of such revenues: Provided that nothing herein contained shall lessen or prejudicially affect any security to which the company, or any proprietor or creditor thereof now is, or may be, entitled, upon the fund called 'The Security Fund of the India Company,' " &c.

Sec. 56. "The military and naval forces of the East India Company shall be deemed to be the Indian military and naval forces of her Majesty, and shall be liable to serve, &c. and be entitled to the like pay, pensions, allowances, and privileges, and the like advantages as regards promotion and otherwise, as if they had continued in the service of the company . . . and the pay and expenses of and incident to her Majesty's Indian military and naval forces shall be defrayed out of the revenues of India."

Sec. 58. "All persons who at the commencement of this Act shall hold any

\* Sir John Benn Walsh having become the legal representative of Lord Clive, filed his bill (which was afterwards amended) against the Secretary of State for India and the Attorney-General, setting forth the above deed, and the \* statutes which had been passed affecting, as he alleged, \* 372 the same, and prayed that the Secretary of State for India might be ordered to pay him the sum of 62,833*l.* 6*s.* 8*d.*, or the equivalent for the same, and also five-eighth parts of the sum of 24,128*l.* (subject only to the charge, in due proportions, for existing pensions), the persons for whose benefit the said sums were designed having ceased to exist, in consequence of the trading of

offices, employments, or commissions under the company, shall be deemed to hold them under her Majesty, and shall be paid out of the revenues of India; and the transfer of any person to the service of her Majesty shall be deemed a continuance of his previous service, and shall not prejudice any claims to pension, or any claims on the various annuity funds of the several presidencies in India, which he might have had if this Act had not been passed."

Sec. 64. "All acts and provisions now in force, under charter or otherwise, concerning India shall, subject to the provisions of this Act, continue in force, and be construed as referring to the Secretary of State in Council in the place of the company, and the Court of Directors, and company of proprietors; and all enactments applicable to the officers and servants of the company in India, &c. shall remain applicable to the officers and servants continued and appointed under this Act."

Sec. 65. The Secretary of State in Council to be sued as the company might have been, "and the property and effects hereby vested in her Majesty for the purposes of the government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the company in respect of debts and liabilities lawfully contracted and incurred by the company."

Sec. 67. "All treaties made by the company shall be binding on her Majesty, and all contracts, covenants, liabilities, and engagements of the company made, incurred, or entered into before the commencement of this Act, may be enforced by and against the Secretary of State in Council, in like manner and in the same Courts as they might have been by and against the company if this Act had not been passed."

Sec. 68. Neither the Secretary of State nor any member of the council to be personally liable, but "all liabilities, and all costs and damage in respect thereof, shall be satisfied and paid out of the revenues of India."

Sec. 71. "Except claims of mortgages of the security fund, the company shall not, after the passing of this Act, be liable in respect of any claim, demand, or liability which has arisen, or may hereafter arise, out of any treaty, covenant, contract, grant, engagement, or fiduciary obligation made, incurred, or entered into by the company before the passing of this Act, whether the company would but for this Act have been bound to satisfy such claim, demand, or liability out of the revenues of India, or in any other manner whatsoever."

the company and its employment of a military force in the East Indies being both at an end.

The answer put in, set up, as a first defence, the Statute of Limitations, relying on the allegation that by the operation of the Act of 1833, the company became a mere trustee for the Crown of the revenues of India, out of which the Indian forces were paid, and that consequently the company had ceased to employ any military forces after April, 1834.

The second defence was, that the officers and men of the  
 \* 373 Indian forces of her Majesty are persons for whose \* benefit the fund must still be administered, the fund not ceasing to exist by events which merely affect the character and position of the original trustees of the fund, and the provisions of the statutes which transferred to the Crown all the rights and benefits, and all the duties, liabilities, and charges of the company, were relied on.

The cause was heard before the Master of the Rolls, who on the 6th December, 1861, dismissed the bill with costs,<sup>1</sup> on the ground that the funds were trust funds, which, as such, passed to the Crown under the Act of 1858, to be applied by her Majesty to the same purpose as if they had been still held by the East India Company.

*Sir H. Cairns* and *Mr. Hobhouse* (*Mr. Bridge* was with them), for the appellant. — The words of the deed describe events which have since actually happened, and by the happening of which the trust created by the deed came to an end. The company no longer employ ships for the purposes of trade, and no longer retains in its military service any troops in the East Indies. The first were taken away in 1834; the troops have by the Act of 1858 ceased to be the troops of the East India Company, and have been transferred to the service of the Crown; or if it should be said that the Act of 1858 did not and could not operate as an absolute transfer from one service to another, it is at least clear that the company no longer employs troops in the East Indies. It was for the benefit of troops in the actual pay and service of the company  
 in the East Indies, and for no other troops, that this sum  
 \* 374 \* of money was vested in the directors as trustees; but it was so vested, subject to an absolute covenant, that it should be repaid whenever the employment of troops in the actual

<sup>1</sup> 30 Beav. 312.

service of the company ceased. That event having happened, the sum is payable in the very terms of the deed. But even if not so payable it belongs to the representatives of Lord Clive, by operation of law, for, the original trust being at an end, there being no general purpose of charity impressed upon the fund, there is a resulting trust for the estate of the donor. And the Act of 1858 does not in words, and cannot by implication, affect the rights of private persons under covenants existing between them and the company.

If there are any objects having claims on the fund it is for the company to make out those claims, and so establish its title to a deduction from liability to repay the whole fund, *Lupton v. White*<sup>1</sup> and *Gray v. Haig*.<sup>2</sup>

*The Solicitor-General (Sir R. Palmer) and Mr. Forsyth (Mr. Melvill was with them), for the Secretary of State for India.*—The deed and the statute must be construed together. The argument for the appellant proceeds on the words of the deed alone, and disregards the provisions of the statute, yet it is by the force of the statute that the claim now put forward is said to have arisen. The event on which that claim is founded has not happened. The company has not ceased to employ troops within the meaning of the covenant, for that covenant only referred to the company ceasing to employ troops while it still held the government of India; it has not done so. The company's troops have, by the force of an Act of \*Parliament, been handed over to \* 375 the Crown. The parties never contemplated this transfer of the Indian possessions from the company to the Crown, or if they did they must have deemed the encouragement for fit persons to enter the service in India to be necessary so long as Indian territory remained under British rule. But independently of that, the words of the statute show that the Crown has taken upon itself all the contracts and obligations of the company, "fiduciary" as well as otherwise, and that Parliament has vested in the Crown for the discharge of these obligations all the funds, of whatever nature, which the company had previously administered. The language of the various provisions of the statute (which they referred to minutely) attests this purpose. This was a specific trust, the purpose for which it was made still continues, and the objects

<sup>1</sup> 15 Ves. 432.

<sup>2</sup> 20 Beav. 219.

it was intended to benefit still exist. As long as there is any British military force employed in India there is no cesser of the trust.

This was not a mere private contract with the company, and is not therefore so to be construed ; it was a transfer of money for the public service, and was always so treated (Mill's History of British India,<sup>1</sup> Report of the Select Committee of the House of Commons<sup>2</sup>), and the reason for which it was transferred to the company still continues. The trust here was not merely to confer a benefit on designated persons to be granted at the discretion of the company, but was a matter of right after certain conditions of service had been fulfilled, and the word pension is expressly used in the grant as it is in the Act. The parties to the deed never

meant that the covenant should come into operation so  
 \* 376 \* long as there were substantial objects of the bounty in existence. They are still in existence, and the Crown is with regard to the troops, and with regard to all the obligations of the company, fiduciary and otherwise, placed by the statute in the same situation as the company itself, and is entitled, by the words of the statute, to the funds existing for the discharge of them.

*The Attorney-General and Mr. Wickens* appeared, but were not heard.

*Sir H. Cairns* replied.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, in the year 1770, that great man, the first Lord Clive, formed the design of establishing a pension fund for the relief of such European officers and soldiers in the service of the East India Company, as might be disabled whilst in that service, and the widows of those who should fall during their service. He seems to have foreseen that the territorial possessions of the company would increase, and that there would be required at all times European troops for the maintenance of those possessions ; and he has accordingly embodied in his deed the principal motive that influenced him, and the object that he sought to attain ; namely, to induce European officers and men to enter into the service of the East India Company.

<sup>1</sup> Vol. 3, p. 435, 4th ed. n.

<sup>2</sup> A. D. 1773.

But, my Lords, he had probably some misgivings about that which the world afterwards saw with admiration ; namely, the power of a few ordinary traders in Leadenhall Street to enlarge, to establish, and to rule dominions of such vast extent, including so many millions of the human race. Accordingly, he provided for the possibility of the company ceasing to employ European officers and \* soldiers in its military service. He probably \* 377 calculated that the time was not far distant when the Imperial Government would be required by necessity, or by expediency, to enter itself into the government of the territorial possessions of the East India Company, reducing the East India Company to its original position of a trading corporation.

Now, in order to accomplish this end, Lord Clive, being possessed of a large sum of five lacs of rupees, which he had lent to the East India Company upon its notes or paper, induced the Nabob of Bengal to advance for a similar purpose a sum of three lacs of rupees, and the entire sum of eight lacs of rupees, together with some interest thereon, amounting, I think to 24,000*l.*, was handed over in effect by Lord Clive to the East India Company ; and it was so handed over, not for the purpose of being invested, not for the purpose of being appropriated or set apart, so far as the principle was concerned, but for the purpose of being blended with the general property and revenues of the East India Company ; but upon the terms that the East India Company should be bound to provide, and apply, an annual sum of money, equal to the interest on the three principal sums, namely, the five lacs of rupees, the three lacs of rupees, and the arrears of interest at the rate of eight per cent. (the ordinary current rate of interest in India), and that the annual sum thus measured by that rate of interest, and thus to be annually paid and provided by the company, should be applied in furnishing pensions to disabled and retired officers and soldiers, and the widows of those who had fallen, in the manner prescribed by the deed.

Now, my Lords, the cardinal question on which this case appears to me to turn, is the ascertainment of what is really the trust fund created by this deed. It has been \* supposed \* 378 by the Master of the Rolls that the whole of the principal money was to be treated as a trust fund ; and throughout his judgment his Honour appears to have regarded that fund as if it had a substantive independent existence, had been transferred by a

recent Act of Parliament, was still in a separate and distinct state of existence and investment, and was as such capable of being dealt with, subject to the trusts which his Honour supposed to have been declared or continued by that Act of Parliament.

My Lords, I cannot concur in that view of the effect of the deed, or of the transaction which it embodied. There is no trust fund so far as the principal is concerned. The East India Company incurred no obligation to set apart or to keep any portion of its revenue in a distinct form, or mode of investment. The only trust fund is the annual interest which the East India Company is bound to provide ; and to apply that is the object of the trust, and upon that, and that alone, the obligations of the deed attach.

My Lords, the duration of the trust is upon the face of the deed perfectly clear ; it will continue so long as there are objects of that trust. The objects of that trust are equally apparent upon the face of the deed ; they are the European officers and soldiers in the service of the company disabled by age, or by the accidents of the service, and the widows of those who died in that service. Therefore, so long as these *cestuis que trust* continue, so long has the trust duration.

My Lords, the next point which is observable in passing, and which follows immediately from what I take leave, with great respect, to denominate the original misapprehension upon which the decree now appealed from is founded, is the position laid \* 379 down by his Honour that \* this bill is not to be regarded as if it were an action of covenant brought by the representative of Lord Clive upon the covenant contained in the deed ; but is to be treated as if it were in the nature of a suit for the retransfer of the trust fund.

My Lords, on the contrary, the suit itself occupies, in the eye of a Court of equity, the precise position, and fills the character which an action at law would, if it had been brought upon the covenant. The obligation of the East India Company is not an obligation in the nature of a duty of retransfer, which may be the subject of a claim for repetition ; but it is a common personal contract entered into by the East India Company, not to pay out of any specific fund — not to render back any definite trust security — but, out of its general revenues, if a certain event should happen, to repay to the representative of Lord Clive such a sum of money as should be equal to the full sum of five lacs of rupees,

that being the property which had been the subject of the original donation by Lord Clive.

My Lords, if that be the nature of the case, the question that arises upon the deed is one simple question alone; namely, Has the event occurred which gives birth to an action or demand founded upon the covenant?

My Lords, that event is expressed in the covenant in the following way: If the united company, after the year 1784, should cease to employ a military force in its actual pay and service in the East Indies, and also ships for carrying on its trade and commerce, then, &c. There are two things here combined. One of them occurred (about which there is no controversy) on the passing of the Act of 1833, when the East India Company ceased to be possessed of ships for carrying on its trade and commerce; it then ceased to be a trading or commercial \* company. \* 380 But the other event did not occur until after the passing of the recent Act, when the company ceased to employ a military force, because the troops were taken away from the company, which was disqualified, by the transfer of the government to the Crown, from employing any military force in its actual pay and service in the East Indies.

Now, in the Court below, there appears to have been no controversy as to whether the event described in the deed had, or had not occurred. There it seems to have been taken for granted, or admitted that it had occurred. Before your Lordships, at your bar, an argument was faintly raised, to the effect that the thing contemplated by the deed was a voluntary act of the East India Company, and that the operation of the Act of Parliament being in the nature of a proceeding by *vis major*, could hardly be regarded as coming within the meaning of the covenant. My Lords, I apprehend that that is an erroneous position, and that we have no right to limit in any such form as that suggested by the argument, the natural meaning and effect of the deed. In all probability Lord Clive, the author of the deed, contemplated the cesser of the employment of a military force by the East India Company in the very manner in which that has happened, namely, by the intervention of the Home or Imperial Government. But the Act of Parliament, requiring the company to cease to employ a military force of its own, cannot be regarded as any thing in the nature of a tort or wrong; and therefore the company must be



considered to have properly, duly, and in a manner consistent with every obligation, ceased to employ a military force in its actual pay and service.

If, therefore, our attention in this matter were limited entirely to the deed, and bounded only by the consideration of that \* 381 which is found in the deed, there would be no \* question but that the right of action on the covenant would enable Lord Clive's representative, subject to the restrictive words contained in the covenant itself, to claim and recover from the East India Company the five lacs of rupees.

Now, my Lords, although the East India Company became, immediately upon the execution of the deed of 1770, absolute proprietor and owner, with no fiduciary obligation, of the money then represented by the company's paper, the notes, and which, on the surrender of these notes, became blended and mixed with the general funds of the company, yet, in the year 1833, in the alteration that was then made in the condition of the company, it seemed good to Parliament that all the debts and liabilities of the company should be charged upon the revenues of India. We must therefore look at the matter as if this contingent liability, this possibility of a claim, embodied in this covenant, came then within the operation of the words of the Act of 1833; and if it even should ripen into a positive demand, it would be a demand which, according to the Act of 1833, would have to be satisfied, out of the general revenues of the East India Company.

In that condition of things, the Act of 1858 was passed. The manner in which the Master of the Rolls regards this Act of Parliament I have already adverted to. His Honour, as it appeared to him, having satisfactorily arrived at the conclusion that there was a trust fund, that the covenant must be regarded as a trust to transfer, addresses himself first to the inquiry whether this Act of 1858 has or has not operated a transfer of that supposed or assumed trust fund. His Honour arrives at the conclusion that the trust fund is transferred. My Lords, I have already com- \* 382 mented upon that position, which is a \* necessary consequence of the original erroneous assumption in point of construction of law, and the consequence thereon in point of fact.

His Honour having come to the conclusion, therefore, that the trust fund is transferred to the Secretary of State, and transferred

with fiduciary obligations contained in it, next inquires whether, upon the face of the Act of Parliament, he finds any thing like a continuation of the original trust, or rather (speaking with greater accuracy), a substitution of the different *cestuis que trust*, or objects under a different denomination, for the original objects of the supposed trust. And his Honour's judgment appears to have been founded chiefly on a consideration of the two sections, namely, the 56th and the 58th sections.

With regard to the 56th section, my Lords, it appears to me with submission, that it is the only part of the Act upon which any thing like a reasonable argument can be founded by the respondents. The portion of the 56th section upon which I felt for some time the force of the respondents' argument, consisted in the particular word "pensions," — "the like pay, pensions, allowances, and privileges." The Master of the Rolls regarding the fund as transferred, interprets the word "pensions" as comprehending the claims upon the fund, and he therefore arrives at the conclusion, that by necessary implication there could be no right to a retransfer of that assumed trust fund if it be transferred, and transferred *cum onere*, namely, transferred with the liability of a right assigned to the Queen's forces of claiming pensions out of that fund.

If your Lordships will forgive the repetition, I would point out to you that the moment you arrive at the conclusion that there is no such trust fund, that there is \* nothing in the \* 383 world more than personal liability on the part of the company, that which is contended for by the respondents may be in point of fact conceded, without creating any prejudice or difficulty in the way of the claim of the appellant. Because, let me suppose that there was no external thing that could answer this word "pensions," in the 56th section, save those pensions that are described and acknowledged by the trusts of the deed of 1770, yet this only would follow, that there was a continuation, in favour of the transferred troops, of the pensions to which those troops in their original status and character might have become entitled. But the pensions thus continued, would be pensions payable by the East India Company, and pensions which the general revenues of the East India Company, now transferred to the Secretary of State, would be the proper fund to answer and discharge.

My Lords, if we arrived at that conclusion, and conceded *in om-*

*nibus* the argument of the respondents, the question would still remain, how and in what manner is the right of Lord Clive under the covenant, arising as it did immediately on the cesser of the employment of troops by the East India Company, affected or taken away by any thing contained in this Act of Parliament? If indeed that claim were a claim for retransfer only, and the thing claimed had been transferred and settled, the argument sustained in the judgment of that very learned Judge, the Master of the Rolls, would have prevailed. But if the subject of the covenant is nothing in the world more than that which is matter of personal liability, and the covenant is to be answered, not out of a specific fund, but out of general funds, then the fact that the pensions, to

be equally answered out of the general fund, are themselves \* 384 continued, will not in the slightest degree prejudice or affect the right of the covenantee to bring that action, and prosecute that claim, which is clearly given to him upon the event which has happened, and the prosecution of which there is not a word in this Act of Parliament, that by any species of implication in the smallest degree, is released or prevented.

But, my Lords, I am by no means satisfied that the word "pensions" is to be read as the argument of the respondents would require, namely, the pensions given by the deed of 1770. There might be and there are indications of there being many extrinsic things that would answer the word "pensions," and satisfy its meaning, without assuming that it was intended to denote those pensions payable under the deed of 1770. And the onus would lie upon the respondents to prove that the state of things was such that the word "pensions" would have no extrinsic thing to answer or satisfy its meaning, save the pensions under the deed of 1770, an onus which the Secretary of State for India has by no means discharged.

My Lords, another argument arising upon this 56th section was this, that the word "provisions," which occurs in the latter part of the clause in connection with those words, namely, "all other laws, regulations, and provisions," must be taken to be used here as a word comprehending the deed of 1770, and the provision thereby made for the officers, soldiers, and widows. But it is impossible to give any acceptance to that suggestion. The word "provisions" is clearly intended here to indicate the ordinances, rules, directions, and things *ejusdem generis* with those things

denoted by the words with which it is found in company, namely, things answering to laws and regulations. You will observe also that the \*antecedent words are these, not that the \*385 forces, and the persons hereafter enlisting, shall have the benefit of the provisions, but that the forces and persons hereafter enlisting shall continue and be subject to all Acts of Parliament, laws of the Governor-General of India in Council, and articles of war, and all other laws, regulations, and provisions, relating to the East India Company. The word "provisions," therefore, was clearly here not intended to mean any thing in the sense in which we often now use the word "provisions," namely, as a material benefit in the form of an allowance of "pensions" or gratuity, but "provisions" is here used in the sense of regulations or rules in conformity with the meaning of the other words, "laws and regulations."

The argument is rested, in the judgment of his Honour the Master of the Rolls, upon the words of the 58th section. There it is said that the officers who are transferred from the East India Company, for the purpose of the legacy, shall be so transferred without prejudice to any claims of pension, or "any claims on the various annuity funds of the Presidencies in India," which they might have had if this Act were not passed. My Lords, it is impossible to hold that these words are intended of necessity to designate, or do designate the particular provisions under the deed of 1770, seeing that there are other things that sufficiently answer it; but it is perfectly immaterial whether they do or do not, because if I had found a positive declaration by the Legislature, in clear and definite language, that the transferred troops and their successors in the service should have the full benefit of retiring pensions for themselves and allowances for their widows, and all the other advantages designated by the deed of 1770, yet such positive enactments, unless they were accompanied by an enactment releasing or prohibiting the claim of Lord Clive's \*representative under the covenant, would not in \*386 my view of the law, and of the operation of the Act of Parliament, in any manner have availed to take away the right of action under that covenant, either directly or indirectly. Not directly, certainly, for there is nothing in the Act of Parliament in the smallest degree abrogating a private right. Not indirectly, because even if those words had been found in the statute, they

would not in the smallest degree have interfered with the fund on which the claim of Lord Clive's representative arises. Nor would they in the smallest degree have created this state of things, namely, the impossibility of answering the enactment without resorting to the fund in question.

My conviction, therefore, my Lords, is, that this view of the case, which was the view taken in the Court below by his Honour the Master of the Rolls, is a view radically erroneous; and that the error originated through a mistaken assumption, that there did exist, both in law and in fact, a separate trust fund, and that that separate trust fund was the subject of the claim made, under the covenant in the deed, by the bill. That, my Lords, I conceive is a mistaken view, both of the facts and of the law of the case. And it follows of necessity that, consistently with every rule by which these Acts of Parliament ought to be interpreted, especially the rule that they should be so interpreted as in no respect to interfere with or prejudice a clear private right or title, unless that private right or title is taken away *per directum*, the right of action under the covenant remains unaffected. Upon these grounds, I must therefore advise your Lordships to dissent from the view taken by the Master of the Rolls, and to make a declaration in conformity substantially with the prayer of the bill.

But then, my Lords, a difficulty arises, and that difficulty \*387 \*arises from the circumstance that the extent and operation of the covenant in the deed are themselves limited and qualified by the insertion of words that bind the extent of the right of action, and limit the damages to be recovered in that action: and which, therefore, introduce the necessity of ascertaining how much will remain from time to time to be disposed of by an application to a Court of equity, such as that which has been made by this bill. For by the power of a Court of equity alone could that due apportionment be made which could extricate the action from the embarrassment thrown upon it by the words to which I have referred.

Now, my Lords, the words are, that these five lacs shall be paid to Lord Clive's representatives, "but subject, nevertheless, with the interest of the said three lacs of rupees, in the proportion the said sums bear to each other, to the payment of all such pensions and annuities, for the lives of the persons then entitled thereto

only, as should, at the time such event should happen, be payable out of or chargeable upon the trust fund."

It becomes necessary, therefore, to ascertain the whole number of charges on the aggregate fund, namely, the interest at eight per cent. upon the eight lacs of rupees. Then it becomes necessary to apportion out of the body of those pensioners or encumbrancers that relative part which is properly attributable to the five lacs; of course this must be done in an equal ratio. What I mean to convey by an "equal ratio" is this, that not only shall the same amount of pensioners in number and value be thrown upon the five lacs, as answers the just proportion which the five bear to the eight, but also that in ascertaining the objects to be henceforth attributed, for the purposes of this account, to the five lacs, a rule shall be found to make those objects, — those *onera* equal in point \* of value to the *onera* that will be left \* 388 to be answered by the three lacs. As an illustration of what I mean, let me suppose that there are sixteen pensioners; then of those sixteen pensioners, if they were all of the same age, it would be easy to take five eighths and attribute them to the five lacs, leaving the remaining three eighths to be attributed to the three lacs; but if there are many pensioners of a variety of ages, then they must be classified, and an equal proportion, namely, five eighths of the whole of each class, must be attributed to the five lacs, leaving an equal proportion, namely, three eighths of the whole, to be attributed to the three lacs.

My Lords, I have endeavoured, as far as it is possible to express them in words, to frame certain suggestions, which I will take the liberty to read to your Lordships, as the rule to be adopted by the Judge at chambers, in ascertaining those several proportions; and if your Lordships approve of it, the course I should recommend you to adopt would be this: not immediately to make these words part of your final order by your vote, but approving of them generally for the purpose of your present proceeding, to let them be handed to the parties who will respectively make, if they think proper, such observations and suggestions, or alterations as they may deem right upon them, which they shall be at liberty to hand in to the clerk of the Parliament, who will communicate with me; and then, my Lords, with your permission, I will communicate with your Lordships upon those suggestions, and the final order shall then be in that manner ascertained and settled.

With these observations I will read the form in which I would submit that your Lordships' order, subject to what I have said, should be ultimately framed, that it may take the place of the order of dismissal pronounced by the Master of the Rolls.

\*389 "Declare that, subject to the \* payment of such of the annuities and pensions properly and duly granted by the East India Company, under the provisions of the deed of 6th April, 1770, before the passing of the Act of 1858, and now subsisting, as shall, under the inquiry hereinafter directed, be found to be payable out of the interest of the five lacs of rupees in the deed mentioned, — the appellant, as representative of Lord Clive, is entitled to receive from the respondents the full sum of five lacs of sicea rupees. Refer it to the Judge in chambers to ascertain what annuities or pensions granted by the East India Company, under the deed of April, 1770, were in existence at the passing of the Act of 1858, and are now subsisting, and to apportion and ascertain such of them as, having regard to the whole amount of the funds applicable under the deed, and the whole number of the pensions subsisting at the passing of the Act, ought now to be attributed to and paid out of the interest of the said five lacs of rupees."

My Lords, I will stop here to observe that the words here used, "the whole amount of the funds applicable under the deed," may perhaps lead to a little misapprehension, because your Lordships will find that the covenant in the deed refers only to the five lacs, and the three lacs; and, therefore, I apprehend that the 24,128*l.*, the amount of interest due at the time, is not to be taken into account. It should therefore be, "as, having regard to the eight lacs of rupees, and the whole number of the pensions subsisting at the passing of the Act, ought now to be attributed to, and paid out of the interest of the said five lacs of rupees. And declare that such part of the five lacs as shall not be required by its interest to keep down the pensions, that shall be so apportioned, such interest being computed at eight per cent., and also such parts of the

\*390 last-mentioned \* principal funds" (that is the five lacs)

"as shall be from time to time released by the cesser of any pension or pensions, ought to be paid over by the respondents to the appellant. And decree the same accordingly, with liberty to apply to the Court below, from time to time, in the event of any nonpayment, in which case all questions of interest are reserved."

My Lords, I dare say the parties will observe that the possibility of some of the pensions that were apportioned, failing between thirty days after the passing of the Act of 1858 and the present time, is not provided for, and they might possibly claim interest thereon. But I think in a matter of this kind, in which it is impossible to proceed without an apportionment, your Lordships might not have been advised to accede to that description of claim; I therefore mention it only for the purpose of precluding that head of claim.

Further, let the respondent pay to the appellant his costs of suit up to and including the hearing before the Master of the Rolls, and reserve further consideration and subsequent costs.

LORD BROUGHAM. — My Lords, I take quite the same view of the case which my noble and learned friend has taken, and for the reasons which he has assigned. I had some little doubt at one time upon the different modes of expression used in describing the cesser of employment by the East India Company of military and naval forces, the one being, "that in case it should happen that the said company after a certain date mentioned should cease to employ a military force in the actual pay and service of the company in the East Indies, and also ships for carrying on the company's trade and commerce," and the \* other being, \* 391 "that in case it shall so happen that the United Company," not "should cease to employ," but "should have no military force in their actual pay, or service," then so and so shall happen. But, upon further consideration, I rather think that the latter clause which I have now read aids the construction to be put upon the other, and that "shall cease to employ a military force," must be taken to mean "shall in any way cease to employ," just as in the same way the former clause said, "shall have no military force." I think that aids rather than obscures the construction. My noble and learned friend has stated that the parties will be enabled to give in their suggestions; of course they must understand that it is not any suggestion as to the number or amount of the pensions that they are to be allowed to give in, but a suggestion as to the mode and manner of ascertaining them.

LORD WENSLEYDALE. — My Lords, I agree entirely in the opinion which has been already expressed by my noble and learned



friend on the Woolsack, and by my noble and learned friend who preceded me, that the decree of the Master of the Rolls should be reversed.

The first question in the case is as to the construction of the deed of the 6th April, 1770, between the East India Company and Lord Clive. I think there is not any proper trust of the sum of five lacs of rupees, 62,833*l.* 6*s.* 8*d.*, with interest at the rate of eight per cent. constituted in the East India Company for the benefit of certain objects, who are, undoubtedly, the European officers and private men employed in the East India Com-  
 \* 392 pany's military and marine service. But \* whether there is or is not any proper trust, there is unquestionably a covenant between the company and Lord Clive, suable upon as a covenant, to repay the five lacs of sicca rupees and interest. And the principal question is, whether the events have occurred upon which that sum was payable.

The event was expressed to be, In case at any time after the commencement of the year 1784, the united company should cease to employ a military force in its actual pay and service in the East Indies, and ships for carrying on trade and commerce; then, as soon as the event should happen, the company covenanted to pay to Lord Clive or his executor for his own use, at the Treasury in Calcutta, the five lacs, &c., subject to all such pensions and annuities, for the lives of the persons then entitled thereto only, as should at the time such events should happen be payable out of, or chargeable upon the said trust fund, according to the true intent and meaning of that deed.

It is perfectly clear to me that the deed reserves a right to pensions and annuities to the then existing pensioners and annuitants only, who have been already admitted and received as such. And I think that the section on which so much argument took place at the bar, the 56th section of the Act of 1858 (21 & 22 Vict. c. 106), giving the new military and naval forces of the Crown the pensions and privileges of the old Indian forces of the company, cannot possibly be construed to alter the terms of the private contract with Lord Clive, and to give a right to claim a part of the fund to be reserved for them. That clause refers no doubt to other pensions, if any.

\* 393 Has the event then arisen upon which the five lacs \* of rupees, &c., subject to existing charges, were covenanted to

be paid? If it has, the balance must be paid over to Lord Clive's representatives, and they have a right to sue for it.

I think it clear that the event has happened, because since the commencement of the year 1784, and on the passing of the Act of 21 & 22 Vict. c. 106, the East India Company ceased to employ a military force in its actual pay and service in the East Indies. And had already, in June, 1834, ceased to employ ships for carrying on its trade and commerce.

It was contended that, looking at the precise words of the covenant, the cesser must have been intended to be whilst the company held the government of the East Indies; for the payment of the sum was to be at their Treasury at Calcutta; and that, in its proper sense, ceased to exist at the same time that the event happened. But I have no doubt that the true meaning of the covenant is, that the money should be repaid to Lord Clive, subject to existing interests, at the time that the new objects of the intended charity, the European army of the Company, should cease to be supplied; and that the place of actual payment was not an essential part of the covenant. I think, therefore, that the appellant would have now a right to recover against the East India Company if it still possessed the funds; and if so, he undoubtedly has against the respondent, the Minister for India. The judgment of the Master of the Rolls, therefore, ought to be reversed.

How much the appellant ought to recover then, becomes a question. If the East India Company has kept an account of the number of the annuities which have been granted out of the trust fund, and the duration of the lives of the annuitants, there will not be the least \* difficulty in ascertaining how much \* 394 ought to be paid to the appellant as the annuities drop. But if, as it is suggested, the company has not kept such an account, there is a serious difficulty to be contended with. If the suit was at law, as the number of the annuities would be peculiarly within the knowledge of the defendants, the burden of proof would fall upon them; and if they could not satisfy it, and show present charges on the fund to an equal amount, I am much inclined to think that the plaintiff would recover the full amount. But as that is probably too strong a view of the rights of the appellant, I entirely agree that the case should be disposed of in the manner suggested by the Lord Chancellor.

LORD CHELMSFORD. — My Lords, the questions which have to be determined in this case are, first, Whether the event has occurred upon which the five lacs of rupees, of which the directors of the East India Company were the trustees, under the deed of the 6th April, 1770, are by the covenant contained in that deed to be repaid to Lord Clive, or his representatives. And, second, Whether assuming the occurrence of that event, the Act of 21 & 22 Vict. c. 106, “for the better government of India,” has deprived the appellant of the right to repayment.

Upon the first question it is unnecessary to consider the circumstances which led to the creation of what is called the Clive Fund, or the motives which induced Lord Clive to institute it, further than they are disclosed by the deed itself. By the recitals in the deed he declares his intention to establish a provision for “such of the officers and private men employed in the company’s service as should be disabled by age, war, or disease contracted during their service.” And that this provision

\* 395 \* was intended to apply exclusively to the company’s troops appears most clearly from the proviso and covenant for its cesser in the event of the company ceasing to employ a military force “in their actual pay and service.” Has the company, then, within the meaning of the covenant, ceased to employ such military force? It is unnecessary to consider the bearing upon this question of 3 & 4 Wm. 4, c. 85, because it appears to have been conceded in argument that after that Act, the East India Company still continued to have troops in its pay and service, and that the employment of a military force by the company did not terminate until the passing of the Act 21 & 22 Vict. c. 106. By that Act the military and naval forces of the East India Company were converted into the Indian military and naval forces of her Majesty, and the company had no longer any military force in actual pay and service.

The event contemplated by the deed has thus arisen. But it is contended that this event has been brought about by means entirely different from those which the parties had in view, and which are not within the spirit and meaning of the covenant. It is said that the evident intention was that the five lacs of rupees should be repaid only if the company, retaining the same authority and position which it possessed at the time of the execution of the deed, should, by a voluntary act, cease to employ a military force ;

but that it was the Act of 21 & 22 Vict. c. 106, which deprived the company of all its former authority and powers of government, and transferred its military force to the Crown by the will of Parliament, and so was not the voluntary cessor of the employment of that force by the company.

But the answer to this argument seems to be, that if this was the intention of the parties it has not been expressed.

\* The words of the covenant are plain and without any \* 396 qualification, "in case it shall happen that the said united company shall cease to employ a military force in their actual pay and service." To "cease" does not necessarily import an act of free will. The East India Company has ceased to employ a military force because it has no longer any necessity for its employment. And the words of the covenant are fully satisfied by the event in whatever manner it has been produced. The question then is, whether the Act of Parliament which occasioned the event, on which the liability under the covenant arises, has also taken away the benefit of it from the representative of Lord Clyde. The Master of the Rolls was of opinion, that, according to the construction of the deed of 1770, "the five lacs of rupees were a trust fund in the hands of the East India Company, and that according to the plain construction of the 39th section, as explained by the rest of the Act, and, by the general scope and purport of it, this trust fund, in common with all other trust funds held by the East India Company for the government of India, passed to her Majesty, to be applied to the same purpose. Now upon this it must be observed that his Honour's judgment proceeds altogether upon the foundation of there being a specific trust fund which could be transferred by the Act of Parliament to the Crown; whereas, as it was rightly stated in argument, there was no such distinct and separate fund, but a mere charge upon the revenues of India, to be applied to the payment of the pensions according to the trusts of the deed, the amount to be repaid in a certain event. The 39th section of the Act, therefore, seems hardly applicable to the case. There is no trust fund which, under the words "real and personal estate of the company, subject to the debts and liabilities affecting the same," can \* become \* 397 vested in her Majesty. It is to the 42d section, providing for contracts and covenants existing at the time of the passing of the Act, that this description properly belongs. That section

enacts "that all debts of the company and all sums of money" (to take the most general expressions) which if this Act had not been passed would have been payable by the company out of the revenues of India in respect or by reason of any covenants (*inter alia*) then existing, shall be charged and chargeable upon the revenues of India alone.

It was argued for the respondents, that as the Act itself produced the event upon which the liability on the covenant arose, it is not the case of a debt or sum of money which, if the Act had not passed, would have been payable by the company, but a liability which arises by the passing of the Act. This argument, however ingenious, cannot prevail against the obvious intention of the Legislature to keep alive all covenants and contracts and liabilities of the company upon them, and to make them chargeable upon the revenues of India alone, as the same would have been if the Act had not passed.

But it is said, although the 67th section of the Act would have given a remedy for the enforcement of the covenant against the Secretary of State, yet by the provisions of the Act the five lacs of rupees cannot now be reclaimed, but must be retained to satisfy pensions in favour of future claimants whose rights are expressly secured to them by the Act. By the covenant the repayment of the five lacs of rupees is to be subject "to the payment of all such pensions and annuities for the lives of the persons then entitled thereto only as shall at the time such event shall happen be payable out of or chargeable upon the said trust fund," words

\* 398 which prevent \* the possibility of any future claimants upon the fund.

But it is contended that by the 56th and 58th sections of the Act, the rights of future claimants are reserved. I omit any particular consideration of the 39th section which was supposed to aid this view, because it seems to me to be clear that the words "the benefit of all contracts, covenants, and engagements," in that section mean that these contracts, &c. may be enforced by the Crown as they might have been by the company, if the Act had not passed. The parts of the 56th and 58th sections relied upon are, in the 56th section, the words "that the military and naval forces of the East India Company shall be deemed to be the Indian military and naval forces of her Majesty, and shall be entitled to the like pay, pensions, allowances, and privileges, and the like advan-

tages as regards promotion and otherwise, as if they had continued in the service of the said company"; and in the 58th section the words "and the transfer of any person to the service of her Majesty shall be deemed to be a continuance of his previous service, and shall not prejudice any claims to pension or any claims on the various annuity funds of the several presidencies in India, which he might have had if this Act had not been passed." The word "pension" in both these sections was a good deal dwelt upon in the course of the argument. On one side it was asserted that there was nothing to which this word could apply, except the Clive fund. On the other, it was said that they were pension funds in the company's military service to which the word would be more properly applicable. I am not disposed to lay much stress upon this word. Whatever the disputed fact may turn out to be, I have no doubt that the word was introduced, not \* with \* 399 reference to any particular fund, but as one of several general words intended to continue to the East India Company's forces when transferred to the service of her Majesty, all the benefits of whatever description which they previously enjoyed. The first part of the 56th section applies to the existing military and naval forces of the East India Company, and secures them against any prejudice which might otherwise arise from their change of service. The latter part relates to persons thereafter enlisting, and makes them subject to the laws, regulations, and provisions relating to the East India Company's military and naval forces.

I did not quite follow the argument upon the words "shall be deemed to be the Indian military and naval forces of her Majesty," and "the transfer of any person to the service of her Majesty shall be deemed to be a continuance of his previous service, and shall not prejudice any claims to pensions." But it seemed to me to be insisted that they in some manner perpetuated the right of the company's troops, transferred to the Crown upon the Clive fund; against the express words of the deed of 1770; and under the 56th section, that persons thereafter enlisting into the India Company's service would also have a claim upon this fund. I think this latter view of the effect of the section was afterwards abandoned, but reliance was still placed upon the word "provisions" as sufficiently pointing to the Clive fund, in case the word "pensions" in the previous part of the section did not apply to it. But looking to the company in which this word "provisions" is found,

it seems clearly to relate to matters connected with the discipline and regulation of the troops ; and at all events not to stipulations contained in private deeds and covenants. And besides, this word

“ provisions ” is found in that part of the section which  
 \* 400 \* applies to persons “ thereafter enlisting,” who are now admitted not to have any claim upon the Clive fund ; and therefore it is of no importance to ascertain its exact meaning.

The question is whether, allowing as wide a meaning to the general words of the Act as they ought properly to receive, and regarding the manifest intention of the Legislature that the military forces of the East India Company, when transferred to the service of her Majesty, should be secured in the enjoyment of every benefit and advantage, of whatever description, which they previously possessed, it can be held that, against the express words of a covenant providing that upon a given event (that has occurred) a fund shall cease with respect to all except those who were at the time enjoying the benefit of it, that fund was intended to be perpetuated and must now continue to subsist for the satisfaction of future claims, which never could have arisen under the covenant. I think that looking to the whole scope and object of the Act, it cannot be said that the Legislature intended to interfere with the rights of the representative of Lord Clive, under the deed of 1770, and that the event has occurred upon which he is entitled to the five lacs of rupees, subject to the rights of the existing annuitants and pensioners upon the fund.

Undoubtedly, this must give rise to an inquiry attended with some difficulty. It was contended for the appellants, on the authority of *Lupton v. White*<sup>1</sup> that as the company had confounded the five lacs of rupees with their own funds, and applied them together, so as to be undistinguishable, the proper course would be to charge the respondent with the whole of the five lacs of  
 \* 401 rupees, \* leaving him to show what specific pensions were charged upon the Clive fund, which probably would be wholly out of his power. But the course thus suggested is at variance with the argument of the appellants, that there never has been what was called an ear-marked Clive fund. For the principle which was sought to be applied in *Lupton v. White*, was stated by Lord Eldon to be “ that if a man having undertaken to keep the property of another distinct, mixes it with his own, the

<sup>1</sup> 15 Ves. 432.

whole must both at law and in equity, be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture upon his part." The case of the appellants is in part founded upon the fact that there was no undertaking on the part of the company to keep the five lacs of rupees distinct from its own property, and therefore that there was no unauthorized mixture of property upon which the equity contended for could arise.

My Lords, I agree with my noble and learned friend on the Woolsack as to the mode of disposing of this case, and as to the inquiries which ought to be directed consequent upon the declaration of the right of the appellant.

*The Solicitor-General.* — Before your Lordship puts the question, perhaps you will pardon me if I make one remark. No notice has been taken, in what has fallen from your Lordships, of the fact that two claims were made by the bill and persevered in at the time when the printed case was put in here, and that one of them was abandoned at your Lordships' bar. That claim, which I refer to, was the \* claim of five eighths of the sum \* 402 of 24,128*l*. I would submit to your Lordships, whether your Lordships should not continue the dismissal of the bill as to that claim, and whether that matter has been taken into your Lordships' consideration, with regard to the subject of costs.

*THE LORD CHANCELLOR.* — If the Secretary of State for India had conceded any part of the claim, that might be material; but the Secretary of State has conceded no part. No additional cost has been thrown upon the respondents by reason of that claim being made, which has not been sought to be maintained at the bar. I, therefore, do not think that we ought, on that account, to vary our declaration on the subject of costs. The Secretary of State sought for the dismissal of the bill with costs, and he must now obtain the same equity which he was entitled to at the original hearing.

The following order was afterwards entered: —

That the decree of the Master of the Rolls be reversed. And it is declared, that, subject to the payment of such of the annuities



and pensions duly granted by the East India Company, under the provisions of the deed of the 6th of April, 1770, before the passing of the Act of the 21 & 22 Vict. c. 106 (1858), "for the better government of India," and now subsisting, as shall, under the inquiry hereinafter directed, be found to be payable out of the interest of the five lacs of rupees in the said deed mentioned, the appellant, as representative of Robert, the first Lord Clive, is entitled to receive from the respondent, her Majesty's Secretary of State in Council of India, the full sum of five lacs of sicca

\* 403 rupees; and that it be referred to the Judge in chambers, to whom the cause is attached, to ascertain what annuities or pensions granted by the East India Company, under the said deed of the 6th of April, 1770, were in existence at the passing of the said Act of the 21 & 22 Vict. c. 106 (1858), and are now subsisting, and to apportion and ascertain such of them as, having regard to the whole amount of the eight lacs of rupees applicable under the said deed, and the whole number of the pensions subsisting at the passing of the said Act, ought now to be attributed to and paid out of the interest of the said five lacs of rupees; and that such part of the five lacs of rupees as shall not be required by its interest to keep down the pensions that shall be so apportioned, such interest being computed at eight per cent. per annum, and also such parts of the last-mentioned principal funds as shall be from time to time released by the cesser of any pension or pensions, ought to be paid over by the Secretary of State in Council of India, to the appellant; with liberty to the appellant to apply to the Court below, from time to time, in the event of any nonpayment, in which case all questions of interest are reserved. And that the Secretary of State in Council of India do pay to the appellant his costs of suit up to and including the hearing before the Master of the Rolls. And that the further consideration and subsequent costs be reserved. And that the cause be, and is hereby, remitted back to the Court of Chancery, to do therein as shall be just and consistent with these declarations, directions, and this judgment.

Lords' Journals, 21st May, 1863.

## \* THE QUEEN v. SADDLERS' COMPANY.

\* 404

1863.

THE QUEEN on the prosecution of KAY DINS- } *Plaintiff in error.*  
 DALE, . . . . . }  
 The Wardens and Assistants of the SADDLERS' } *Defendants in error.*  
 COMPANY, . . . . . }

*Corporation. By-Law. Bankruptcy. Insolvency. Pleading.*  
*Mandamus. Quo Warranto.*

A by-law of a corporate company declared that "no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the Court, unless it be proved that such person after his bankruptcy or insolvency has paid his debts, or shall have established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency":—

*Held*, that these words must be taken to mean not mere inability to pay debts in full, but inability proved by some outward act, a notorious or avowed insolvency, such as a public stoppage in business, or the calling together of his creditors, and obtaining time, or terms of indulgence, or entering into a deed of composition, so as to mark, as a distinct fact, a period of time from which the insolvency like the bankruptcy might be computed.

Per LORD CRANWORTH.—This interpretation alone could make the by-law good.

Where, therefore, a person, duly qualified as a freeman, was elected a member of the Court, being at that time in insolvent circumstances, and was admitted to office, and was afterwards declared a bankrupt, it was held that he did not come within the meaning of the by-law.

After election, but before being admitted, the person elected was asked by the clerk of the company (though it was not averred in the return, and did not appear in evidence, that the question was put by the authority of the Court) whether he was solvent, to which he answered that he was as solvent as any member of the Court, and could pay 20s. in the pound. This representation was false, and was afterwards made the ground of a resolution of the Court, passed without notice to him, to remove him from office:—

*Held*, that the insolvency here was not within the meaning of the by-law; that the false representation was not one which affected his eligibility, and consequently that having been duly elected and admitted to the office, his removal without being heard in his defence was erroneous.

A person validly elected to an office and admitted to it, cannot be removed from it without notice.

The charter of the company gave the wardens and assistants thereof power to make such by-laws as, according to their sound discretion, should be for the good government of the general body.

\* 405 \* Per LORD WENSLEYDALE. — Under this charter a by-law made by them would be valid, though it might have the effect of limiting the number of persons eligible to office by superinducing new qualifications, as to which the charter was silent.

Per LORD WENSLEYDALE. — In order to show a valid objection to the admittance, after election, the return should have stated an insolvency within the true meaning of the by-law.

In the 36th year of the reign of Charles II., a charter was granted to the Saddlers' Company, of which the parts material to the present case were these: That there should be appointed from among the freemen of the company practising the art or mystery of saddlers four persons, who should be called the wardens or keepers of the company, and twenty other persons, who should be called assistants. That it should be competent for the wardens and assistants, or the major part of them, for reasonable causes, for his ill government, or ill conducting of himself, to expel or remove from office any warden or assistant, when another was to be elected. That the wardens, together with eight or more of the assistants, might make laws for the good government of the wardens, &c. and of all others of the mystery, such laws, &c. not being repugnant to the laws and statutes of the kingdom, nor to the customs of the city of London, nor to the jurisdiction and privileges of the mayor and commonalty.

On the 23d April, 1799, the wardens and assistants passed the following by-law: "That no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honorable character for seven years subsequent \* to such his bankruptcy or insolvency, to the satisfaction of the Court, or the majority of them."

In the early part of the year 1849 there was a vacancy among the assistants of the company. At a Court of wardens and assistants held on the 23d April, 1849, several freemen were named as eligible, and Kay Dinsdale was elected a member of the Court of Assistants. The resolution to elect him was confirmed at the next subsequent Court, held on the 25th July, 1849. On the 24th September, 1849, Giles Clarke, the clerk of the company, put to Dins-

dale a question as to his solvency, to which Dinsdale (who did not then know that he had been elected) answered that he was quite as solvent as any man of the Court, and able to pay his creditors 20s. in the pound. After that date Mr. Clarke caused Dinsdale to be summoned to attend a meeting of the next Court, to be held on the 20th October, 1849, and then to take on himself the office of assistant. On that day Mr. Clarke communicated to the Court the question he had put, and the answer he had received. Dinsdale attended on the same day, took the oaths required by the charter, and was duly admitted to the office. He afterwards attended two meetings of the Court, and acted in his office. On the 30th November, 1849, Dinsdale was declared a bankrupt, in respect of debts due long before his answer made to Mr. Clarke. On the 20th December, the wardens and assistants held a meeting to which Dinsdale, though as one of the assistants entitled to attend, was not summoned, and, at that meeting, without any notice given to him, he was declared to be removed from his office of assistant. That office confers on the holder eligibility to be appointed by ballot to the office of Renter Warden, in which he would receive the funds of the company, and of Prime Warden, in which he would have great authority in \*the \*407 control, management, and expenditure of those funds.

In November, 1852, Dinsdale applied to the Court of Queen's Bench for a mandamus to restore him to the office of assistant of the Saddlers' Company. The mandamus having issued, a return was made, setting forth very fully the above facts, and insisting that Dinsdale had "ill conducted" himself, and that he had been lawfully excluded from the Court of Assistants. The plaintiff in mandamus traversed the return, denying any ill conduct, not denying the answer to Clarke, nor the subsequent adjudication of bankruptcy; but insisting that the Court had no right to expel him in the manner and under the circumstances thus stated. The case was tried before Lord Campbell at the sittings after Michaelmas Term, 1858, when a special verdict was agreed to be settled. The special verdict set forth the above facts, and found that Dinsdale's representation as to his solvency was false and fraudulent. The special verdict was afterwards argued, and a peremptory mandamus awarded.<sup>1</sup> This decision was reversed in the Ex-

<sup>1</sup> 30 Law J. N. S. Q. B. 186. See a translation of the charter of Charles 2, id. 189, n.

chequer Chamber.<sup>1</sup> The present proceeding in error was then brought.<sup>2</sup>

*Mr. Gibbons* (*Mr. Laurie* and *Mr. Sewell* were with him), for the plaintiff in error. — There has not been here any thing done on the part of the plaintiff in error which affords a lawful justification for his removal from office. He had been, without any  
 \* 408 \* interference on his part, duly elected. If not disqualified before election, he could not be disqualified after it: *The King v. Hearle*,<sup>3</sup> *The King v. Clarke*;<sup>4</sup> and in *The King v. Slatford*,<sup>5</sup> where a supposed ground of objection on account of insolvency existed, it was said, "This is a mandamus to admit and swear him: they return, by way of excuse, that the person is not qualified, which is no good excuse." The same rule was stated in *The King v. Doncaster*,<sup>6</sup> where it was said, "As he was, in fact, elected, it is not a good return to a mandamus for restoring him, to say that he was incapable of being elected." In *The King v. Lyme Regis*,<sup>7</sup> Lord Mansfield said that after election "they could not remove for want of an original title." The plaintiff was, therefore, entitled to a peremptory mandamus, for the return was falsified, *Buckley v. Palmer*.<sup>8</sup>

Secondly, there is nothing in the facts stated on the return, to disqualify him from holding office. The qualification required by the charter is, that he shall be a freeman of the company; he was, and is so. The by-law created another qualification, not for election but for holding office after election; it was therefore altogether illegal. The statement made by the plaintiff was not false at the time it was made, but even if it had been it was not material, and could not affect his right to the office, for the assistants did not rely upon it when they elected him. *Mason v. Ditchbourne*;<sup>9</sup> *Feret v. Hill*;<sup>10</sup> *Vernon v. Keys*.<sup>11</sup> In fact, he was admitted because he was the senior freeman of those who were nominated.

<sup>1</sup> 30 Law J. N. S. Q. B. 194.

<sup>2</sup> The Judges were summoned, and Lord Chief Justice Cockburn, Lord Chief Baron Pollock, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, and Mr. Justice Blackburn attended.

<sup>3</sup> 1 Stra. 625.

<sup>4</sup> 2 Salk. 430.

<sup>5</sup> 2 East, 75, 83.

<sup>6</sup> 1 Moody & R. 460.

<sup>7</sup> Comb. 419, 420, 5 Mod. 316.

<sup>8</sup> 15 C. B. 207.

<sup>9</sup> Sayer, 40.

<sup>10</sup> 12 East, 632.

<sup>11</sup> 1 Doug. 80, 83.

There was no fraud here, but had there been any it was too  
 \*late to be acted on after the election and admission, on \*409  
 the principle laid down in *White v. Garden*,<sup>1</sup> where it was  
 held that after goods had passed into the hands of a *bond fide* pur-  
 chaser, it was too late for the original vendor to allege that they  
 had been obtained from him by a third person through fraudulent  
 representations.

The by-law is bad. It disqualifies a man who is qualified by  
 the charter, and is therefore in excess of the power possessed by  
 the corporation to make by-laws, *Norris v. Staps*; <sup>2</sup> *The King v.*  
*Ginever*.<sup>3</sup> The principle is thus stated in Grant on Corporations.<sup>4</sup>  
 "A by-law may regulate the enjoyment of a right if the restraint  
 which it imposes on the exercise of the right be, upon the whole,  
 for the general benefit of the corporation; but to impose an ad-  
 ditional qualification on those who have an inchoate right to the  
 freedom of the corporation was considered an infraction of the  
 rule, and therefore a by-law with that object was held to be in-  
 valid"; and many cases are referred to, among others, *The King*  
*v. Tappenden*; <sup>5</sup> *The King v. Tunwell*; <sup>6</sup> *Lee v. Wallis*.<sup>7</sup> (LORD  
 BROUGHAM. — Suppose the by-law had said that he should not be  
 admitted if he had been convicted of a misdemeanour.) That  
 might be the case of an exception, which would prove the rule.  
 There would then be a legal judgment upon him, and it might  
 come within the reasoning of Lord Mansfield in *The King v.*  
*Liverpool*,<sup>8</sup> where it was distinctly held that bankruptcy alone  
 would not justify removal from the office of common councilman,  
 but that the cause for removal must be one of a just and lawful  
 kind; and there too, as in this case, the ground that the  
 common councilman would have the \*management of the \*410  
 corporate funds, was relied on. Certainly mere insolvency  
 is not sufficient. *The Queen v. Owen*,<sup>9</sup> and *The King v. Chitty*.<sup>10</sup>  
 The word "insolvency" does not describe the state of a man's  
 circumstances, but a condition of things settled by law. At the  
 time the by-law was passed, there was no such thing as a status of  
 insolvency known to the law. Bankruptcy was known, but in-

<sup>1</sup> 10 C. B. 919.<sup>2</sup> Hob. 211.<sup>3</sup> 6 T. R. 782.<sup>4</sup> Page 81.<sup>5</sup> 3 East, 185.<sup>6</sup> 3 Doug. 207.<sup>7</sup> 1 Kenyon, 292, Sayer, 262.<sup>8</sup> 2 Burr. 723, 732.<sup>9</sup> 15 Q. B. 476.<sup>10</sup> 5 A. & E. 609.

solvency was not. The by-law is therefore bad on account of uncertainty.

Finally, the plaintiff had a right to be heard, and he was removed without being heard. In *The King v. Gaskin*,<sup>1</sup> a return to a mandamus to restore was held insufficient, because it did not state that the party had been summoned to answer to the charge before he was removed. (LORD WENSLEYDALE. — If he was ever possessed of the office, he could not be removed without hearing. The question is whether he ever was lawfully possessed of it.) He had been duly admitted; being once admitted he could not be removed by a vote of the corporation without a hearing. For the purpose of removal, it is absolutely necessary to proceed by *quo warranto*, *Bagg's Case*.

*Mr. Rochfort Clarke* (*Mr. Knowles* was with him), for the defendants in error. — The great question is, whether this is a good by-law. The case of *The King v. Liverpool*<sup>2</sup> has been misunderstood. The real question there was, whether bankruptcy was a cause of disqualification at common law, for no by-law existed in that case to make it so. Here it does exist; it is in accordance with the enactments in the 5 & 6 Wm. 4, c. 76, § 52, and is therefore a good by-law. So *The King v. Chitty*<sup>3</sup> is inapplicable \* 411 here, \* for that depended on the 28th section of the statute, and as that section specified all the intended disqualifications, and did not specify the one which was said to affect the person whose election was in question there, his election was held valid.

This by-law is in accordance with the 52d section of the Municipal Corporation Act, with the 52 Geo. 3, as to elections of Members of Parliament, since enforced by other statutes, and with the decisions of the Court of Chancery, which have removed persons from being trustees on account of their being insolvents. It cannot therefore be contended that the by-law is unreasonable. And in *The King v. Liverpool*, two things are remarkable, first, that "insolvency" is again and again spoken of as a disqualification, although what are now called the insolvents' statutes did not then exist, and next, that every one of the judges relied on the facts, that Clegg was only one of the common councilmen, and so could

<sup>1</sup> 8 T. R. 209.

<sup>2</sup> 6 A. & E. 609.

<sup>3</sup> 2 Burr. 723, 732, 735.

only vote with the rest upon the money matters of the corporation, and that he had not "the collecting of the money," nor "the fingering of it," nor "the management of it," all which things the plaintiff will have here in his capacity of one of the wardens.

It is no objection to this by-law that it may diminish the number of the eligible. Classes of persons may not be purposely excluded by a by-law, but a by-law which requires a qualification may be good, though it may have the effect of occasioning such an exclusion. *The King v. The College of Surgeons*; <sup>1</sup> *The King v. The College of Physicians*.<sup>2</sup> (LORD BROUGHAM. — Might not the words of this by-law exclude a man who paid 19s. 11d. in the pound?) Such an extreme result \* might follow \* 412 wherever any rule was laid down; but here the rule is not exclusively directed to payment of the 20s. in the pound, for the establishing of a good character for a certain period is made equivalent to such full payment. Such a test of respectability is extremely proper, especially with respect to such an office. In a case of this kind, *The King v. The College of Physicians*,<sup>3</sup> Lord Mansfield refers to usage as justifying a by-law.<sup>4</sup> Here the plaintiff was a member of the corporation, and as such knew the law, and a corporation has, with regard to its own members, a power of making laws which it does not possess with regard to strangers. *Hesketh v. Braddock*.<sup>5</sup>

The plaintiff cannot be treated as having been admitted to this office. In *The King v. The College of Physicians*,<sup>6</sup> Mr. Justice Yates said, that merely being qualified for being an actual member did not make him one. The mere vote of the majority did not make this plaintiff a member of the court of assistants, if he was not in law entitled to be one. Even the case of *The King v. Chitty*<sup>7</sup> does not contradict that. If the plaintiff was not in office, the return here is good, and the principle in *Doe d. Johnson v. Baytup*<sup>8</sup> applies, namely, that having obtained possession wrongfully, he must give it up before he can be allowed to set up a legal title. Here the plaintiff never was lawfully in office, and so could not be said to be removed, for he got in by fraud, and fraud can

<sup>1</sup> 2 Burr. 892.

<sup>2</sup> 7 T. R. 282.

<sup>3</sup> 4 Burr. 2186.

<sup>4</sup> 4 Burr. 2197.

<sup>5</sup> 3 Burr. 1847.

<sup>6</sup> 4 Burr. 2200.

<sup>7</sup> 5 A. & E. 609.

<sup>8</sup> 3 A. & E. 186.



confer no rights. Therefore he was not entitled to be tried at all. The cases cited on the other side are those where the objection was something collateral, or where the estate had passed, and by fiction of law, was in the person, and could not be  
 \* 413 \* taken out of him but by a trial. Such were the cases of *Stewart v. Aston*; <sup>1</sup> *Vernon v. Keys*; <sup>2</sup> *White v. Garden*; <sup>3</sup> *Feret v. Hill*; <sup>4</sup> and such appears to be the principle adopted in *Flight v. Booth*.<sup>5</sup>

Then it is said that the proceeding ought to be by *quo warranto*, and *Bagg's Case*<sup>6</sup> was relied on. But that case was before the Statute 9 Anne, c. 20, which gave a plea in mandamus, and so before the time when the parties could take issue on the return. It was that which rendered a proceeding by *quo warranto* necessary. The same observation applies to *The King v. Chester*.<sup>7</sup> But *The King v. Bloer*<sup>8</sup> was after the statute, and that was a proceeding by mandamus, and the parties agreed to try the merits on a feigned issue. *The King v. Gaskin*<sup>9</sup> itself admits the principle which *The King v. Tidderley*<sup>10</sup> and *The King v. Champion*<sup>11</sup> had in fact established, that the Court may look at the proceedings themselves to see whether there had been a good cause for removal. There had been a good cause here. In *The King v. Griffiths*<sup>12</sup> it was declared that the Court would not grant a peremptory mandamus to restore, under such circumstances, that the party seeking to be restored must be removed immediately afterwards, though in a more formal manner. *The King v. Axbridge*<sup>13</sup> is to the same effect; and to that extent *The King v. Gaskin* may be considered as overruled.

In *The King v. London*<sup>14</sup> a mandamus to restore was refused  
 \* 414 because \* there was shown to have been a good cause of suspension. *The King v. Ward*; <sup>15</sup> *The King v. Lyme Regis*<sup>16</sup> and *Frost v. Chester*<sup>17</sup> are inapplicable here.

Then as to the word "insolvent," it is said not to be used in the by-law in the sense of describing a man's circumstances, but in

<sup>1</sup> 8 Irish Com. Law, 85.

<sup>2</sup> 12 East, 632.

<sup>3</sup> 10 C. B. 919.

<sup>4</sup> 15 C. B. 207.

<sup>5</sup> 1 Bing. N. C. 370.

<sup>6</sup> 11 Rep. 93 b.

<sup>7</sup> 5 Mod. 10.

<sup>8</sup> 2 Burr. 1043.

<sup>9</sup> 8 T. R. 209.

<sup>10</sup> Siderf. 14.

<sup>11</sup> Siderf. 14.

<sup>12</sup> 5 B. & Ald. 731.

<sup>13</sup> Cowp. 523.

<sup>14</sup> 2 T. R. 177.

<sup>15</sup> 2 Stra. 893.

<sup>16</sup> 1 Dong. 80, 83.

<sup>17</sup> 5 Ellis & B. 531.

that of describing a legal condition of things. If there is any doubt as to its meaning, that meaning may be attributed to it which will give effect to the by-law. *The Poulterers' Company v. Phillips*<sup>1</sup> where the words "any person" received a particular meaning, in order to give effect to the general intention of a by-law. *The London Tobacco Pipe-Makers' Company v. Woodroffe*,<sup>2</sup> in several instances affirms the same rule. So here, such a meaning ought to be given to the word "insolvent," as to render effectual a by-law passed in accordance with the principle adopted in several statutes, and plainly tending to promote the good government of the corporation.

*Mr. Gibbons* replied.

THE LORD CHANCELLOR moved that the following questions should be put to the Judges:—

First. Is the by-law good in law?

Secondly. Regard being had to the facts stated in the verdict, was the plaintiff removable under the by-law, assuming it to be good in law?

Thirdly. Ought the plaintiff to have been heard previously to removal?

Fourthly. Having regard to the facts stated in the verdict, ought the Court below to have granted a peremptory mandamus?

\* MR. JUSTICE BLACKBURN. — My Lords, in order to \*415 answer your Lordships' first question, it is necessary to determine what the by-law means. If a by-law were now, in 1863, made in the same words, it might very plausibly be contended that in construing the words "has been a bankrupt, or become otherwise insolvent," we must limit the word "insolvent" to an insolvent *ejusdem generis* with a bankrupt; that is to say, to a person who had obtained the benefit of the Insolvent Debtors Act, or compounded with his creditors under the bankrupt laws; and that a person who had never stopped payment, or committed any overt act of insolvency, and still continued in apparent credit, though his circumstances in fact were such that he was unable to pay all his creditors 20s. in the pound, was not insolvent within the meaning of the by-law; and I cannot but think that the argument

<sup>1</sup> 6 Bing. N. C. 314.

<sup>2</sup> 7 B. & C. 838.

in the judgment of the Exchequer Chamber, that the by-law is not unreasonable, is directed to support a by-law in which the word "insolvent" is used in this limited sense; and if the by-law could be construed in this limited sense, I am by no means prepared to say it is unreasonable. But the by-law now in question was made in 1799, when there was no such system as now exists for discharging insolvent debtors; and I think the by-law made then must be construed so as to include under the term "insolvent" a person who was in fact not able to pay all his creditors 20s. in the pound, though he appeared to pay his way, and though his inability was not known to the public; indeed, unless the by-law has this more extensive construction, the present case is not brought within it.

The dates appear on the special verdict: they show that his actual bankruptcy was after he was *de facto* fully in possession of the office. And the by-law cannot apply \* 416 in this case, unless the state of things found by the verdict to have existed on 29th July, 1849, viz. "being in insolvent circumstances and unable to pay his creditors 20s. in the pound," is becoming insolvent within the meaning of the by-law; so that if the by-law could be construed in the more restricted sense, there would be a very short answer to this case. The question proposed by your Lordships, therefore, seems to me to be, whether the by-law, understood in the more extended sense, is reasonable, and I think it is not.

It frequently happens that a person, who believes himself to be very rich, is in truth not able to pay 20s. in the pound, and this without any fault on his part. An unexpected disaster may have destroyed property situated in some distant part of the world; and the unfortunate man, who thought he owned property of great value, may learn some morning that weeks before a hurricane destroyed his plantation, or that the mutineers in India had burned his indigo factories, or that the United States Bank in which he held stock had stopped payment, or that the State of Pennsylvania has refused to pay its debts, and so his bonds which he valued high had become of little value, and consequently that he had, since that disaster happened, unconsciously been "insolvent" in this sense, without the least suspicion of the fact. I have referred to these examples because they all have occurred in my own time; but many similar examples might be put. It is no part of the by-law that the insolvent should know of his insolvency, if, in fact, it

existed ; and the fact is by the by-law made an absolute disqualification ; so that if such disaster as I have supposed happened abroad the day before the election, then, though the person elected were, by the aid of friends or otherwise, to succeed in paying his creditors in full in \*ever so short a time after the \*417 election, he is to be absolutely ineligible ; I cannot think that reasonable.

In the present case the agent of the wardens and assistants, on the 24th September, 1849, inquired of Dinsdale if he was solvent ; the answer made was, that he was as solvent as any man in the Court, and able to pay his creditors 20s. in the pound. This, it is found by the verdict, was untrue, to his knowledge ; and on the bankruptcy which, two months afterwards, ensued, he only paid 2s. 8d. in the pound, and the jurors have found that this representation was, on his part, fraudulent. But though this was the particular case, we must, in considering the reasonableness of a by-law, look to what would be generally the case ; and it seems to me that a by-law is unreasonable which authorises an inquiry of this sort into the affairs of a trader still continuing to carry on his trade, especially when, as in the present case, the inquiry is to be made on behalf of his competitors, or, at all events, is to be made on behalf of those carrying on the same trade. I do not think that any trader, even if convinced that his assets would enable him to pay much more than 20s. in the pound, would like to be called upon to give proof of his ability to pay 20s. in the pound to his rivals in business. The value of the property of a trader, and the goodness of the debts, which form part of his stock, must always be to some extent a matter of opinion ; and I believe the case is common that a large and lucrative business is carried on with great profit, and yet that if stock were taken it would be a question of doubt whether the assets would equal 20s. In such cases an inquiry of this kind, whether the trader allowed or declined to permit the inquiry, would equally tend to shake his credit, and very probably to produce that insolvency which did not really \*exist. It is to be observed also, that the inquiry \*418 extends back to the time when any one of his debts, still remaining at the time of the election unpaid, was contracted. If there is an old mortgage debt still unpaid which was contracted twenty years ago, the candidate is by this by-law disqualified, if at any time within that twenty years he was unable to pay 20s. in the

pound, unless he establishes a fair and honourable character for seven years ; and even if he does establish such a character, he is absolutely disqualified if the inability occurred within the seven years. This I think very inconvenient and oppressive. The test of eligibility imposed is very vague, and I think unnecessary. I am therefore of opinion that the by-law, understood, as I think it should be, in the sense which is necessary to bring this case within it, is unreasonable and not valid.

In answering the second question, I will first recapitulate the facts as they appear to me to be stated on this record. [His Lordship did so.]

It is left somewhat ambiguous on the record for what cause he was removed. As I construe the return and the special verdict, they removed him on account of his bankruptcy, after the election and admission (which would be clearly illegal), and not on account either of his insolvency at his election, or his false representation before his admission ; neither of which matters seems to have been brought forward at that meeting ; and on which matters, as I read the record, no decision was come to at that meeting.

In my view of the law, even if they had inquired into the insolvency at the time of the election, and into his false representation before his admission, and had, after hearing Dinsdale, found both those facts to exist, and upon that finding had removed \*419 him, the removal would have \*been bad ; but before proceeding to give my reasons for this opinion, I wish (in case your Lordships should take a different view of the law) to point out that I do not think it can be contended that a removal made on a ground bad in law can be supported, because facts did exist which, if brought before the assistants, might have led them to remove him on a ground good in law. The jury found that in fact Dinsdale did procure his admission by a false and fraudulent representation to Mr. Clarke, but it is not by any means improbable that the assistants on 20th December might, if the question had been put to them, have come to a different conclusion. And even if your Lordships should hold that these grounds might authorise a removal in point of law, it might well have been that the meeting of 20th December might have thought it inexpedient to remove on such a ground.

These considerations make me think it important to call your

Lordships' attention to what appears on the record as to the ground on which the removal really proceeded. I think, however, that Dinsdale having been in fact admitted and sworn in, and having acted, so that the office was full of him, he was not removable either on the ground that his title was defective, or that the admission by which he got into the office was obtained by a fraud. I take the rule of law to be, that to a mandamus to admit a corporate officer, it is a good return that he was not duly elected; for in that case he ought not to be admitted, but that to a mandamus to restore a person who has been removed after having been admitted and sworn in, it is not a good return, because the office being full, the corporation is bound to show a just cause for the removal, and as it cannot remove for want of an original title, a return of not duly elected is bad. *The King v. \* Lyme Regis*.<sup>1</sup> The \*420 principle, as I understand it is, that when the office is full, the title of the person in actual possession can be questioned only by *quo warranto*; the power of the corporate body not extending to remove any person actually in, except for some corporate offence subsequent to his admission. If it always was in the power of a corporate body, after any lapse of time, to open up the question of whether a corporator *de facto* in the exercise of the office was originally duly elected, it would lead to very inconvenient results. It would be in the power of the majority to inquire into the title of any troublesome member of the minority. I am not sure that even now there would not be a risk of this power being abused for party purposes when party spirit runs high; but I take it there can be no doubt that in the days when the majority in a corporation determined two votes in Parliament, partisans would, as a matter of course, have abused this power if they had possessed it; and this consideration probably led to the adoption of the rule of law I have just stated.

I think that in the judgment in the Court of Exchequer Chamber, it was not disputed that this was the general rule of law, but it was said that the effect of the admittance was defeated, because it was obtained by fraud; and the reasoning seems to me to amount to laying down the principle that, inasmuch as a man cannot take advantage of his own wrong, every act or thing brought about by his fraud or wrong is, as against him, to be treated as if it never had existed. In this I cannot agree. Fraud, as I think,

<sup>1</sup> 1 Doug. 85.

renders any transaction voidable at the election of the party  
 \* 421 defrauded; and if, when it is avoided, \* nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration.

This was clearly laid down in *Clarke v. Dickson*.<sup>1</sup> There the plaintiff was induced by the fraud of the defendants to become a shareholder in a company. It was held that under the circumstances in that case, he could not treat the contract as void, and sue for money had and received. The reason was that he had, in the interval between the making of the contract and the discovery of the fraud, received dividends and otherwise dealt with the property. It was urged in the argument that "it is hard if all remedy for the fraud is lost, where the deceit can be prolonged till the deceived party has acted upon it." My brother Crompton answered, "All remedy is not lost. He can no longer rescind the contract, which would work injustice, but he may bring an action on the deceit, and recover his real damage." And that was in effect the judgment of the Court. But if the law be that the defendants could not take advantage of their wrong in prolonging the deceit, in the sense that all things procured by their fraud were to be taken against them, to be as though they had never been, that decision was wrong. But I think it is not the general rule of law that a wrong-doer must be treated as if all things procured by his wrong had never existed. It is trite law that if a person is tricked out of the possession of goods with a felonious intent, it is larceny; but if he be induced, by fraud, to part with the property, it is no larceny. The common law was, that

\* 422 the wrong-doer might take advantage of his \* own wrong for that purpose; and it required legislation to make him, who was really as bad as, but was not a thief, punishable for obtaining goods by false pretences. So in the case of *Feret v. Hill*,<sup>2</sup> where the plaintiff, by fraud, procured the defendant to agree to take him as tenant of a house, it was held that the landlord having let the proposed tenant into possession, and executed a lease to him, it was too late for the landlord, on discovering the fraud, to treat the whole transaction as void and turn the tenant out.

<sup>1</sup> *Ellis, B. & E.* 148.

<sup>2</sup> *15 C. B.* 207.

It is said in the judgment in the present case in the Exchequer Chamber, that the judgment of the Court in *Feret v. Hill* proceeded on the ground that "the fraud was held to be collateral, and not to go to the root of the contract." But I have much difficulty in understanding how the Court could, if acting upon that principle, enter the verdict for the plaintiff on the finding of the jury that the plaintiff had induced the defendant to let the apartments to him by fraud and misrepresentation. If the Judges proceeded on that principle, the utmost they could have done was to grant a new trial. The ground on which, as I take it, they proceeded, is that stated by Justice Maule in the course of the argument, viz. that though whilst the agreement was executory, the landlord had a right on discovering the fraud, to exercise his option to avoid the agreement, yet his option was determined on letting him into possession and vesting the term in him. The cases of *Philipson v. The Earl of Egremont*,<sup>1</sup> and *Earl of Bandon v. Becher*,<sup>2</sup> and *Fermor's Case*,<sup>3</sup> cited in the Exchequer Chamber, are authorities to show that for fraud or deceit there is a remedy for the \* party injured, but they in no way show that \*423 all things procured by fraud are, as against the wrong-doer, to be considered as though they had never been. If in the present case an information in the nature of *quo warranto* had been applied for against Dinsdale, and his counsel had urged, in showing cause against the rule, that the relator had concurred in admitting him, and permitting him to act, these cases would have been authorities to prove that under such circumstance he could not avail himself of those acts; but I cannot think they bear upon the present question. And I need hardly point out that if a body corporate could itself remove a corporator on the ground that his admission was procured by fraud, practised on itself, it would, in exercising this power, necessarily act as judge in its own cause, with every conceivable temptation to judge partially. I therefore answer your Lordships' second question in the negative.

To the third question, I say that I think it of the very essence of justice that every person should be heard before judgment is given against him. I do not understand that there is any difference of opinion on this point. The judgment of the Court of Ex-

<sup>1</sup> 6 Q. B. 587.

<sup>2</sup> 3 Rep. 77 a.

<sup>3</sup> 3 Clark & F. 479.



chequer Chamber proceeds on the supposition that Dinsdale was not removed, inasmuch as against him, he was to be taken as never having been in the office, because his fraud had procured his admission. I have already given my reasons for dissenting from this view of the law, but even if it were so, I think the prosecutor should have been heard before this fraud was taken as proved. I therefore answer this question in the affirmative.

To the fourth question, I answer that, though on the rule the Court may refuse to grant a mandamus, if upon the whole the Judges think it clear that no good end could be obtained, \*424 because at that stage of the proceeding \*the Court can exercise discretion, and has the means of ascertaining all the facts which should guide it in the exercise of its discretion; yet when the writ has issued, the peremptory writ ought to be granted or refused, according to what appears to be the legal right on the record; for then the Court must give a judgment on which error may be brought, and therefore must proceed only on those grounds which may be brought into the Court in error. It is impossible for either the prosecutor or the defendants in mandamus to raise by return or by plea all the matters proper to influence the discretion of the Court. There may in every case be facts which, if brought forward upon affidavit, would, if unexplained, satisfy a Court of error, if in the position of the Court of Queen's Bench, when considering whether the rule should be made absolute or not, that it would not be discreet to issue the writ; and there may be other facts which, if brought forward, would explain those facts, and satisfy the Court of error that it would be discreet to issue it; but there are no means, that I am aware of, by which those collateral matters can be brought to the knowledge of the Court in error.

It seems to me, therefore, that judgment ought to be given in every case of mandamus, according to what appears on the records to be the legal right, and not according to discretion.

I have already, in answering the other questions, given my reasons for coming to the conclusion that in this case the legal right is to have a peremptory mandamus to restore and to place the prosecutor in the position in which he was before the unauthorised removal.

I therefore answer your Lordships' fourth question in the affirmative.

\* MR. JUSTICE WILLES.—My Lords, in answer to the first \* 425 question, I am of opinion that the by-law is good in law.

I think it is as important for the character and usefulness of the company, that the members of the Court should be solvent, as it is for that of the College of Physicians, that a physician should have a degree of Oxford, Cambridge, or Dublin, *The King v. College of Physicians*,<sup>1</sup> or for that of the College of Surgeons, that a surgeon should know Latin, *The King v. Surgeons*,<sup>2</sup> and so forth, *Green's Case*,<sup>3</sup> *The King v. Marshal*.<sup>4</sup>

In my construction of it, the by-law goes the whole length of, disqualifying the prosecutor under the circumstances stated in the return and special verdict. The term "insolvent" has been repeatedly construed in a like context, both in private instruments and upon the construction of a statute, to apply to a person labouring under a general disability to pay his just debts in the ordinary course of trade and business. (See Mr. Baron Parke's dictum in *Parker v. Gossage*,<sup>5</sup> adopted in *Doe v. Rees*,<sup>6</sup> *Biddlecombe v. Bond*.<sup>7</sup> It is found in this case that the prosecutor was not merely unable to pay 20s. in the pound, but that he was "in insolvent circumstances," which has always been held to mean what I think "insolvent" means, viz. not merely being behind the world, if an account were taken, but insolvency to the extent of being unable to pay just debts in the ordinary course of trade and business. The Legislature called this insolvency as early as 1746,<sup>8</sup> *Bayly v. Schofield*,<sup>9</sup> \* *Shone v. Lucas*<sup>10</sup> which explain \* 426 what "insolvent circumstances" and "insolvent" mean when spoken of a trade. These cases decide that "insolvency within the meaning of the bankrupt laws" (that is, spoken of a trader) does not mean an inability to pay 20s. in the pound when the affairs of the bankrupt shall be ultimately wound up; but that a man is in insolvent circumstances "when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do."

I presume that the reason why there was no discussion as to the meaning of the word "insolvent" in the Court of Queen's

<sup>1</sup> 7 T. R. 282.

<sup>2</sup> 2 Burr. 892.

<sup>3</sup> 1 Burr. 127.

<sup>4</sup> 2 T. R. 2.

<sup>5</sup> 2 Crompt., M. & R. 617.

<sup>6</sup> 4 Bing. N. C. 384.

<sup>7</sup> 4 A. & E. 332.

<sup>8</sup> 19 Geo. 2, c. 32, § 1.

<sup>9</sup> 1 M. & S. 338.

<sup>10</sup> 3 Dowl. & R. 218.

Bench or Exchequer Chamber, was because it was felt that the judgments against the prosecutor and his subsequent bankruptcy, together with the finding of the jury as to his being in "insolvent circumstances," precluded any doubt as to his being "insolvent," in the substantial and business sense of the word. Indeed, that part of the return alleging the prosecutor's insolvency is not traversed, so that if any extent of insolvency short of bankruptcy may be provided for by the by-law, that extent of insolvency in the prosecutor is admitted upon the proceedings. I see no distinction, in good sense, between excluding a bankrupt under a statute, and excluding an insolvent unable to go on paying his just debts in the ordinary course of trade, though not under a statute. There were empty bags before the first Bankrupt Act, together with all the pliancy and want of consideration which proverbially belong to them.

Construing "insolvent" as above, I can entertain no doubt that the principle of the by-law is sound. I need hardly add that a by-law ought to be construed so as to make it valid, and not so as to defeat it, *Poulters' Company v. Phillips*.<sup>1</sup>

\*427 \*And I think that the form of the by-law is good enough. In this case, where the candidate was actually insolvent at the time of the election, and from thence up to and at the time of the admission, I apprehend that the by-law absolutely disqualified him; and that it is needless to maintain the latter part of the by-law as to an inquiry before the Court, because it is now clear that by-laws are divisible, *The Queen v. Lundie*.<sup>2</sup>

But I go further, and say that there is no objection to a by-law imposing a condition subsequent upon election, and that even if read in the narrowest sense as applicable to an admission after an election, the by-law is good. The supposed difficulty of working such a by-law is imaginary. In every case where an oath is to be taken, a qualification to be made out, or a security to be given, there is practically a condition subsequent to the election to an office. If such condition be not fulfilled, why should not that be good cause of removal? A custom, equally with a by-law, must be reasonable; and in *Wright v. Fawcett*,<sup>3</sup> a custom that a burgess of Morpeth should be approved of by the lord of the manor before

<sup>1</sup> 6 Bing. N. C. 314.

<sup>2</sup> 4 Burr. 2041.

<sup>3</sup> 31 Law J. N. S. M. C. 157.

being admitted and sworn, and that the prosecutor was not so approved by Lord Carlisle, the lord of the manor, was allowed to be returned to a mandamus to admit. Thus there may be a test applied between election and admittance. But, as I have observed, in the present case the prosecutor was throughout in a state of disqualification.

As to the inquiry being conducted before the Court of Assistants, it appears to me that a domestic tribunal is the least onerous upon the candidate, and likely to be the most favourable to a man of real merit. And, it should be observed, \* that he is not \* 428 compelled to be a candidate, nor to accept office if elected. If he were compellable, this by-law is no more inquisitorial than that which was upheld in the well-known case of the *City of London v. Vanacre*.<sup>1</sup> That by-law was in substance, that a freeman elected sheriff shall not be discharged unless he swear with six compurgators that he is not worth 10,000*l.*, and that if any freeman elected and proclaimed shall not enter into a bond of 1000*l.* to accept the office, "not having a reasonable cause to be allowed by the Lord Mayor and Court of Aldermen," he shall forfeit 400*l.*; 100*l.* whereof to go to the next sheriff, and the rest for the use of the city. Amongst many other objections of the sort made in this case, it was objected that the mayor and aldermen were made the judges of the excuse; but all the objections were overruled, and Lord Holt's judgment in that case seems to me to make an end of the objection in this respect to the by-law under consideration. The latter part of the by-law, as to making out a fair character, is in case of the candidate; and if it be thought objectionable for any reason (I own I can see none) it may be rejected. The general rule is clear, that corporations may make by-laws for their internal regulation, and amongst others, by-laws for applying a reasonable test of fitness, provided they be not contrary to law or reason. To defeat a by-law, some distinct rule of law or reason ought to be shown to have been violated; if it be founded in a principle which does not violate law or reason, it ought not to be defeated by microscopic objections to the mode in which, or the extent to which, the principle is applied. There is no authority against this by-law; it is notoriously in accordance with the \* practice of the city, now called in question for the first \* 429 time, and it is unassailed by any reason except that it is

<sup>1</sup> 12 Mod. 270, 1 Ld. Raym. 497.

painful to bankrupts or insolvents, and that persons sometimes become bankrupt or insolvent by misfortune, without fault or mismanagement. But this involves the fallacy of making laws for individual or accidental cases, instead of for those of ordinary occurrence, "*Ad ea quæ frequentius accidunt jura adaptantur.*"

In answer to the second question, I am of opinion that the plaintiff was removable under the by-law, assuming it to be good in law. The finding of the jury as to his circumstances makes it clear that the bankrupt was insolvent, not only in the sense that he was unable to pay 20s. in the pound when his affairs were wound up, but also that he was not in a condition to pay his debts in the usual and ordinary course of trade and business, so as to be for business purposes insolvent. The finding of the jury is, that "he was in insolvent circumstances, and unable to pay his creditors 20s. in the pound"; and it further appears that he owed large sums of money on judgments and otherwise, which he was unable to pay, and which have not been paid. And by the uncontradicted statement in the return, it appears that he, soon after his admittance, became bankrupt, and only 2s. 8d. in the pound have ever been paid by way of dividend. How it could be more clearly shown, or in what other sense it could be shown that a man was insolvent, it is difficult to understand.

I must here add that for the purpose of establishing such insolvency as I have already shown to have, in fact, existed in the case of the prosecutor, it is not necessary to resort to the special verdict, though that sufficiently finds it; because that part of the return which states that he was insolvent is not traversed.

\* 430 The return, \* after setting out the by-law, states that the prosecutor was "insolvent," using the language of the by-law, and that statement the prosecutor has admitted, so that if "insolvent" in the by-law ought to have a restricted meaning, this return must be read as stating the prosecutor to be insolvent in that sense. Presumption and intendment, so far as they go, are to be made in favour of a return, not against it. (Per Justice Buller, *The King v. Lyme Regis*.<sup>1</sup>)

If, then, the bankrupt was within the by-law and disqualified, I cannot doubt that this was "a just and reasonable cause" for removal, under the express terms of the power of removal given by

<sup>1</sup> 1 Doug. 159.

the charter, which makes a *quo warranto* unnecessary, at least so far as the prosecutor is concerned.<sup>1</sup>

As to the cause for which the prosecutor was removed, it is sufficient, if there was a removal, and a sufficient cause for removal, though different from the professed one, if it was different, which I cannot see. It is familiar law that except in case of ratification, it is not what a man says or thinks, but the authority which he in fact has, that justifies him. *Dr. Groenvelt's Case*.<sup>2</sup>

In answer to the third question, I think there was no necessity to hear the plaintiff previously to removal. This was not the case of removing a member of the body for a corporate offence. This was the finding out and expulsion thereupon from the governing body, of a person who ought not to have been elected, or to have sat upon the Court, any more than if he never had been a member of the corporation; and who had insinuated himself into the Court by means of a falsehood. If the \*insolvency had \*481 been discovered before the prosecutor had actually sat upon the Court, and so technically been admitted, it is clear that if the by-law be valid, the matter found by the special verdict would have been an answer to the mandamus; for the mandamus in that case must have been to admit, and must have shown a valid election, and a return thereto of no valid election would have been sufficient, *The King v. Williams*,<sup>3</sup> even if not sufficient to a mandamus to restore, *The King v. Jotham*.<sup>4</sup> I am at a loss to conceive that the fact of his having taken his seat at the Court, under the cover of a mistake of fact on the part of the members caused by his own falsehood, and as to which the return alleges and the jury has found, that "by means of the said false and fraudulent misrepresentations, he induced and procured" them to admit him, can better his position. He got in by unfair means, and having been detected and expelled, he now insists that he ought to be let in again, because of having once, *quocunque modo*, got in; contrary to a maxim, *Dolus vel fraus nemini patrocinetur*. The admission cannot be put higher than a judgment or decree; and a judgment or decree obtained by fraud upon a Court binds not such Court, nor any other; and its nullity upon this ground,

<sup>1</sup> See this power of removal, translated in 30 Law J. N. S. Q. B. 189, n.

<sup>2</sup> 1 Ld. Raym. 454.

<sup>4</sup> 3 T. R. 575.

<sup>3</sup> 8 B. & C. 681.

though it has not been set aside or reversed, may be alleged in a collateral proceeding, *Philipson v. Lord Egremont*; <sup>1</sup> *Lord Bandon v. Becher*; <sup>2</sup> *Shedden v. Patrick*.<sup>3</sup>

In considering the distinction between a mandamus to admit or restore, and a mandamus to proceed to a new election, the \* 432 difference ought not to be overlooked between \* cases in which there is a special power to remove, as here, and cases where there is not such a power. But there is another difference worth marking. The ground upon which, as a general rule, a mandamus will not lie to proceed to a new election before a *quo warranto* is issued, to avoid an election *de facto*, followed by admittance, does not apply here. That ground I take to be, that upon the mandamus to proceed to a new election, the person who is in the office has no opportunity of being heard, and in order to give him an opportunity of being heard, and for no other reason, a *quo warranto* is necessary. That is wholly inapplicable to this case, because in the present proceeding, instituted by the prosecutor himself, he has been heard in a suit, of which he had the conduct. To restore him because he has not been heard, would create a new fiction.

As to the fourth question, having regard to the facts stated in the verdict, and, of course, not overlooking that part of the return which is admitted because not traversed, I am of opinion that the Court below ought not to have granted a peremptory mandamus. For the purpose of arguing this question, I must assume that the by-law is good, and the plaintiff disqualified thereby, but that there has been some irregularity in the mode of removal. Even if this be so, I think the proceeding by mandamus ought not to be perverted, by being applied to the restoration of a person whom there was cause to remove (that cause being now, "*res judicata*" in a suit to which he is a party), and who ought to be, and presumably will, if restored, be forthwith expelled for the same cause, which now he is estopped to deny. In *The King v. Griffiths*,<sup>4</sup> \* 433 upon a mandamus to restore, \* the return stated a power to remove, a sufficient cause, and a removal. The question arose upon the record. It was insisted that the removal was not regularly made, but the Court refused a peremptory mandamus;

<sup>1</sup> 6 Q. B. 587.

<sup>2</sup> 3 Clark & F. 479.

<sup>3</sup> 1 Macq. Scotch App. 535. See also *White v. Tommney*, 4 H. L. Cas. 313.

<sup>4</sup> 5 B. & Ald. 731.

Lord Tenterden saying: "I am clearly of opinion that the Court is not to grant a peremptory mandamus in a case where, if the party was restored, he might be immediately removed again." I am not aware that that decision has ever been departed from, nor that statutes as to procedure have, *sub silentio*, taken away the character of the prerogative writ of mandamus.

I regret the length of this opinion. Had it not been for a fear that I might seem wanting in due respect for the House, I should have contented myself with saying, that I adhere to the judgment of the Court of Exchequer Chamber.

MR. JUSTICE CROMPTON. — In answer to your Lordships' first question, I say, that in my opinion the by-law is not good. I think that the making of by-laws, by which the governing part of a corporation restricts or puts a qualification upon the persons who are to be elected beyond what the charter has pointed out, ought to be looked at narrowly. The present by-law disqualifies, subject to certain exceptions, every one who has ever been unable at any time to pay his creditors 20s. in the pound; and although he has got his certificate in the most honourable way, or his creditors have given him the most complete and creditable discharge, he is still within the operation of the by-law, unless he is proved to have paid his creditors subsequently in full. The disqualification does not depend on any act of bankruptcy, or on any fiat, petition, or definite legal proceeding in bankruptcy or insolvency, \*but might have to be ascertained from a laborious and \*434 painful inquiry into the state of the candidate's circumstances at any particular anterior time, and after the lapse of many years. The by-law must be taken to extend to the not being able to pay the creditors in full at any time, or else its operation would not extend to the present case, in which the prosecutor has not committed any act of bankruptcy or insolvency previous to his admission. The exception of having established a fair and honourable character for seven years subsequently to the insolvency, to the satisfaction of the Court, or a majority of the Court, seems to me very loose, uncertain, and unsatisfactory, and to give far too wide a discretion to the Court of electors, or the subsequent Court. A by-law of this nature ought to be certain, and it seems to me extremely loose and uncertain to leave it to the judgment of the persons comprising the elective body to say whether there has been



an honourable character satisfactory to them. If the insolvency is intended as a disqualification against being elected, the by-law would seem very objectionable, as it would appear to imply that the electors before they record their votes are to come to a decision whether there has been a subsequent honourable character to their satisfaction. If the true construction of the by-law were that the disqualification is a disqualification against being elected, great difficulties might arise as to whether a notice of the disqualification to the voters before voting might not cause their votes to be thrown away, and the adverse candidates to be elected. I do not, however, think that this is the real meaning of the by-law, as it would seem impossible to be acted upon, especially in an election for several vacancies, where there are several candidates. I think that

\* 435 the by-law has the meaning put upon it in the \* Court of Queen's Bench, and that its true construction is, not that the electors at the time of election are to see to the qualification, but that it is to be a disqualification against the admission as distinguished from the election. The charter obviously points to a distinct period for admission and election ; it requires some things to be done before election, and some after election, and before admission : and it might happen, as it seems to have happened in the present case, that the party might not know of his election, and might not have had an opportunity of being prepared with proof of his payment of his debts, or his good character, to satisfy the electors. The charter, as before pointed out, requires several things to be done before admission, and after election, and in corporation law the distinction was perfectly well known, and I do not see why the word "admission" in the by-law should not be read in its plain ordinary sense, especially where it is several times used in the same document, as contradistinguished from election. On this, which is, I think, the true construction of the by-law, it seems to me very objectionable that a subsequent Court, perhaps not consisting of the same members, should have the power of confirming or vacating the prior election, on an investigation, for instance, whether the party has established what the Court should think an honourable character. This is very loose and uncertain, and practically would leave far too much in the discretion of the body. A candidate might succeed at the election by one vote, and it might be voted afterwards at the subsequent Court by a majority of one, that at some distant period the party had not been able

to pay the whole of his creditors 20s. in the pound, and that he did not appear, to the satisfaction of the Court, to have established an honourable character for seven years subsequently.

\* It is obvious what a different view might be taken by different members of the Court, as to "an honourable character," and I cannot but think that so loose a provision might lead to unfairness and mischief.

There is another point of view in which also the provision seems to me very objectionable; such a disqualification against admission as is pointed out in the charter, *exempli gratia*, for not taking the oath of supremacy, &c. depends on a fact which is capable of proof, when the question of title comes before the proper legal tribunal, as upon a mandamus the party so refused admission might allege and prove that he had taken the oath; but this could not be so on such a discretion as is vested in the assistants by this by-law. They are to have the decision whether the party has established such "honourable character," for it is to their satisfaction that the by-law refers; and it seems to me very objectionable that the by-law should make a disqualification, and afterwards give a discretion of dispensing with it, if the assistants should be satisfied with the honourable character. I speak of this power as discretionary, because I think that if there was a return to a mandamus to admit, that the party had not been at a certain time able to pay 20s. in the pound, and the prosecutor were to plead to this return that he had established a fair and honourable character, to the satisfaction of the subsequent Court, he would be told that the question was for their decision. It would hardly be matter for a traverse and for the decision of a jury whether he had done so; and if it were, it would only show more clearly the loose and dangerous nature of the by-law. The consideration of the mode in which this power and discretion are to be exercised seems to me to show still more clearly that the decision is to take place after the election; as \* the question as to whether the dis- \* 437 cretion is to be exercised according to the facts in any particular case, can only arise after the electors have selected the particular persons. It would seem impracticable, if not impossible, to exercise this power at the time of the election; and if it could be done, it would, I should think, be very objectionable; and I think the real meaning is, that the subsequent Court is to have the discretion and power of dispensing with the disqualification;

but whichever be the construction in this respect, I think the by-law bad.

Secondly, I am of opinion that the party being actually in the office, the Court of Assistants had no power to try his title, and that the proper course of removing him would be by *quo warranto*. Where the office was full, the Court of Queen's Bench could not, in case of an alleged disqualification, proceed, except by *quo warranto*; and could not, according to well-established rule of law, grant a mandamus to proceed to a fresh election; and it would seem strange in such a case to allow the corporate body so to interfere. I agree with the observations of my brother Wightman, in the Court of Queen's Bench, in this respect. I do not look at this question as depending merely on the formal act of admission, but on the fact of the office being full of the party. The question of title in such case is, I think, always for the Court of law, and not for the corporation, who cannot try the original title when the office is full of the party, *The King v. Lyme Regis*.<sup>1</sup> The general rule of law being admitted, the answer offered, that the election or formal act of admission was obtained by fraud, and so was to be regarded as never having taken place, and therefore that

\* 438 \* the Court of Assistants might treat a party actually in the office as never having been in it, does not appear to me satisfactory. If the doctrine be pushed to its length, it would show that years after the party had been in the office he might at once be turned out by the corporation; and in cases where the enjoyment of the office for a certain length of time prevents the party from being removable by *quo warranto*, and so gives him a title, it might still be said that he never was elected or admitted, and never was in the office, because fraud renders all these things as if they never were. In any case where an election is alleged to have been obtained by bribery, or by personation of voters, such an argument would equally prevail; and in effect, title would constantly be tried, not by the established Courts, but by the corporation authorities; and the greatest abuses might take place in corporations if, shortly before the elections, the majority might disqualify a large portion of the electors at once by saying, "you only got to be members of the corporation by trick or falsehood, or bribery, and your acting as corporators by means of such fraud is null; you have never, therefore, been members of the corporation,

<sup>1</sup> 1 Doug. 85.

and so we strike you off the rolls." In all cases of *quo warranto*, the supposition is that there has been a wrongful assumption of the office as against the Crown ; and I think it would be very dangerous to introduce any such qualification on the general rule as to the trial of such title, as that where the title is sought to be invalidated by fraud, the corporation itself may try it. Understanding your Lordships' second question to mean whether the prosecutor was removable by the Court of Assistants, I answer your Lordships' question in the negative.

And with reference to your Lordships' third question, I answer that I am still more strongly of opinion that the \*Court \*489 of Assistants could not legally remove the prosecutor without his having an opportunity of being heard. This, I think, was the part of the case which particularly struck the late Lord Chief Justice of the Court of Queen's Bench in the earlier proceedings in that Court. For any sufficient corporate offence committed after the party is in office, there is often a power of amotion in the corporation ; and in such case it can hardly be disputed that the party must have an opportunity of being heard. Supposing this a case of amotion, the law is, I think, too clear to admit of a doubt ; and if this be taken as a case in which the wardens and assistants might assume to themselves the jurisdiction of trying the title, I cannot see how, on any principle of justice, they can dispense with calling on the party and hearing what he had to say. The argument the other way would not only give the assistants the jurisdiction of the Court of Queen's Bench, but would enable them to act as no Court could act without giving the party an opportunity of being heard. I answer, therefore, the third question in the affirmative.

As to your Lordships' fourth question, I think that the Court of Queen's Bench ought to have granted the peremptory mandamus as it did.

Where a party has been turned out improperly, I think that he ought to be placed in the same situation as he was before the improper removal took place ; and I think the Court of Queen's Bench, on the removal not being supported by the facts stated on the record, was right in ordering him to be restored.

How far any discretion in the Court of Queen's Bench in such case has been taken away by the statutes giving a writ of error in such cases, if any discretion previously existed as to awarding a

peremptory mandamus, need not, I think, be discussed, as  
 \* 440 the state of the record, in \* my opinion, warranted the judgment, if it did not necessitate it, according to what was thrown out by my brother Blackburn in the Court of Queen's Bench, which may probably be the correct view of the case; and even if there had been any discretion, and if the exercise of such discretion was ground of error, in my opinion the discretion was properly exercised; for I think it a much greater mischief that bodies of this nature should exercise the right of trying such title, without hearing the party, than that there should be the inconvenience pointed out in the Exchequer Chamber that a party should be restored by mandamus where probably he might be subsequently ousted by *quo warranto*. I answer your Lordships' last question, therefore, in the affirmative.

MR. BARON MARTIN, after stating the case, said: In answer to your Lordships' first question, I am of opinion that the by-law is good. It is made, under the authority of a charter, to one of the London trade companies. The company consists of commonalty or freemen of an indefinite number, but the governing body is composed of four wardens and twenty assistants; and a vacancy in the office of assistant is filled up, not by the company at large, but by the remaining members of the governing body. This body has various powers conferred upon it by the charter; and, amongst others, to make by-laws and to manage the property of the company, which is stated to be considerable; and the first office which a member of the governing body is usually called upon to serve is that of renter warden, who, as such, receives, and is accountable for, large sums of money. In the untraversed part of the return the renter warden is said to be the acting treasurer of the company, and his duties are detailed at length. The charter  
 \* 441 also purports \* to confer upon the governing body power to have and execute scrutiny, government, and correction, over all persons exercising the trade of saddlers in the city of London or its suburbs, the borough of Southwark, the city of Westminster, and in all towns, hamlets, parishes, and places within a circuit of two miles of the city of London. This power has probably become obsolete in consequence of change of opinion as to the true interests of trade; but at the time of granting this charter, and for many years after the making of the by-law, it was generally

deemed to be a useful and salutary power. It is therefore obvious that the governing body, and the individuals composing it, ought to be persons entitled to public confidence and respect; and it is impossible to conceive any thing more calculated to destroy such feeling, and bring the company into discredit and contempt, than that members of a self-electing governing body, which is quite small enough in numbers to admit of jobbery and peculation, should be bankrupt or insolvent. The being so (speaking generally) affords strong presumptive evidence of incapacity to manage both their own affairs and those of others; and in my opinion a by-law to prevent a person so circumstanced from being one of the governing body of a trading company of the city of London, is not only not unjust or unreasonable, but right and proper.

In the argument in the Court of Exchequer Chamber, various objections were urged to it. I beg to refer to the judgment there, in reference to them. In the reasons of the plaintiff in error for its reversal, two only are now stated. First, that the by-law limits the number of those who, by the charter, are eligible to the office of assistant. As to this, no doubt a by-law is bad which excludes a class of persons from an office to which they are eligible by the charter; but it seems absurd to call the bankrupt and \* insolvent freemen of the saddlers' company a class within \*442 the meaning of this rule. What the by-law really does, is to create a criterion of fitness and personal disqualification, which, having regard to the objects of the charter, and the functions and duties of the office of assistant, seems to be just and reasonable, and a by-law may lawfully do this. See note to the Case of Corporations.<sup>1</sup> The second objection is, that the by-law was not confirmed, as required by the Statute 19 Hen. 7, c. 7. But this objection is now untenable. It is concluded by the cases which will be found in 2 Kidd, p. 108, and in the digests. Another objection was suggested in the course of the argument, that the disqualification of insolvency was too uncertain and indefinite. I think, however, the insolvency contemplated by the by-law is the species of insolvency analogous to the ordinary case of bankruptcy, viz. the inability of a debtor to pay his debts in the usual and ordinary course of payment, and whose property is insufficient to satisfy them, such an insolvency as at the present day is not unfrequently dealt with by composition deeds; and I should say that the status

<sup>1</sup> 4 Rep. 77 b.

and circumstances of Mr. Dinsdale, as found by the special verdict, that is to say, a trader whose property was only sufficient to pay his creditors 2s. 8d. in the pound after great delay, furnish an apt example of the insolvency to which the by-law applies. It clearly does not mean an insolvent who has taken the benefit of the Insolvent Acts, but something different, as appears upon its face. It also seems to me that the 52d section of the Municipal Corporation Act <sup>1</sup> is a legislative recognition of the validity of the by-law ;

for if bankruptcy and insolvency, and composition with

\* 443 creditors rightly disqualify for the office \* of town council-

lor, a by-law to make such things a disqualification from being a ruling person in a trading company, would seem to be reasonable. For these reasons, in my opinion, the by-law is good.

In answer to the second question, I think Mr. Dinsdale was removable. According to the charter there seem to be two steps to the complete acquirement of the office of assistant: first, the election; and secondly, the admittance to the execution of the office, which is to be upon taking the oath of office. Now, assuming the by-law to be good (which is to be assumed in the answer to this question), Mr. Dinsdale had before his admittance made a false and fraudulent representation to an agent of the wardens and assistants; false, because it was contrary to the truth, and fraudulent because it was knowingly made to an agent of persons interested in the truth, and not upon a collateral matter (as was contended at your Lordships' bar), but on one most material and relevant to and bearing immediately and directly upon his admission to the office. The special verdict expressly finds two things: first, that it was in consequence of this false and fraudulent representation that he was summoned to the Court where he was admitted; and secondly, that he induced and procured the wardens and assistants to admit him by means of it. Under such circumstances the wardens and assistants had, in my opinion, by law the right, upon the fraud being discovered, to treat the admittance as a nullity and as wholly void; and that when they elected so to treat it the state of things became, and was, as if the admittance had never taken place. Upon this question I beg to refer to the judgment in the Exchequer Chamber, and the cases there cited as to the operation and consequences of fraud.

<sup>1</sup> 5 & 6 Wm. 4, c. 77.

\* In answer to your Lordships' third question, I think in \*444 one sense Mr. Dinsdale ought to have been heard. It would have been very much better if he had been; but I do not think his removal ineffectual because he was not. If his removal had been for misconduct subsequent to his admittance, he could not have been legally removed without having been first heard; but for the reasons stated in answer to the second question, I think, under the circumstances, the admittance was rendered void, *ab initio*, by the wardens and assistants determining to remove him for the fraud against the by-law practised by him upon them, and that they, being the defrauded parties, had the right, of their own mere act and will, to annul the admittance without summoning or hearing him. This seems to me to be the legal consequence of the fraud, and analogous to the consequences of fraud in other cases.

As to the fourth question, it would seem extraordinary if the Court of Queen's Bench, under the circumstances, had been bound to grant a peremptory mandamus to restore Mr. Dinsdale to the office. According to the facts found by the special verdict, he was ineligible when elected, and the electors were ignorant of the disqualification. He was then interrogated upon the subject by a person authorised by the wardens and assistants to do so. In answer to him he made a false and fraudulent statement, and in consequence of it was summoned to a meeting. At this meeting the false and fraudulent statement was reported to the wardens and assistants, and by means of it Mr. Dinsdale procured himself to be admitted. Upon the discovery of the falsehood and fraud he was removed. It would seem at variance with the ordinary course of law if he could not only avail himself of his own wrong, but invoke the Court of \*Queen's Bench to aid \*445 him in so doing. The first question is, would the Court have granted a mandamus to admit him? If the by-law was good it would not. He was not entitled to be admitted; and if not, how can the circumstance of his having obtained admittance by means of a false and fraudulent misrepresentation better his position? But the cases seem to conclude this point. Assuming the by-law to be good, Mr. Dinsdale would, if restored to the office, be immediately removable, and the case of *The King v. Griffiths*,<sup>1</sup> and the cases there cited, are to the effect that, under

<sup>1</sup> 5 B. & Ald. 781.



such circumstances, a peremptory mandamus ought not to be granted. One of the cases, *The King v. The Mayor of London*,<sup>1</sup> is somewhat similar to the present.

MR. JUSTICE VAUGHAN WILLIAMS. — As to the first of your Lordships' questions, I am of opinion that the by-law, if it is applicable to the present case, is not good in law.

It runs thus: [see *ante*, p. 405.] It appears to me that by the words "become otherwise insolvent," those who framed this by-law did not mean to apply it to the case of a man who has merely become unable to pay his debts, but to that species of insolvency which is made public and notorious by a composition with creditors, or the like course, publicly taken, when a trader, as it is popularly said, "fails in business," without being made a bankrupt. If the by-law be so construed, I entirely agree with the opinion expressed in the judgment delivered by Baron Martin in the Exchequer Chamber, that it would neither be unreasonable nor illegal as restricting the eligible class. I think the assistants, a Court

\*446 of a \*mercantile community, ought to be allowed to say, "We will not discredit our Court by electing as a member of it any freeman whose mercantile reputation has been publicly stained by his failure to keep his commercial engagements, unless we are satisfied that he has redeemed his character by a subsequent fulfilment of them, or by a course of fair and honourable conduct for the seven years following his disgrace as a trader." Nor is the by-law, if so construed, at all difficult to work. As the fact of the bankruptcy or insolvency so understood would be well known, no one would propose a freeman to be admitted a member of the Court with such a patent disqualification for the office unless the proposer undertook at the same time to satisfy the Court that the person proposed had won his purgation from bankruptcy or insolvency according to the provision of the by-law. And as the time when he became bankrupt or failed in business would be easily ascertainable, there would be no difficulty in fixing the point of time from which the seven years should be reckoned.

If, on the other hand, the words "a freeman who has become insolvent," are construed to mean simply "a freeman who has become unable to pay his debts" (i. e. whose assets will not cover his liabilities), it is not easy, I think, to say how the by-law is to

<sup>1</sup> 2 T. R. 177.

operate. I agree with the Judges in the Exchequer Chamber, that by the phrase "shall be admitted a member," the by-law does not point at admittance as distinguished from election; but that it means to exclude the freeman altogether from being chosen an assistant. Now the by-law will plainly reach the case of a man who has become "unable to pay his debts" at any former period, and whose insolvency, in this sense, was known perhaps only to himself or some confidential clerk or partner. Such a man is precluded \* from being elected unless the Court is satisfied \* 447 that after his insolvency he has paid his debts in full, or won a seven years' honourable reputation. How in such case is the inquiry by the Court to be set on foot previous to the election? When the freeman has become a bankrupt or compounded with his creditors, it cannot be supposed that such a fact will be unknown to those who propose him for admission to the Court. But the fact of the balance having been at some one period in his life on the wrong side of his books will hardly ever be known to the assistants, unless the freeman brings it before them. Is then his election to be annulled if he is chosen under such circumstances, without the Court having been satisfied of the facts prescribed by the by-law, and it is afterwards discovered that though he was solvent when he was chosen assistant, yet at one time his assets were less than his liabilities? The by-law is so worded that I am unable to arrive at any other conclusion than in the affirmative.

The main object of the ordinance probably was to exclude bankrupts from the Court, and the extension of it to persons who "have become otherwise insolvent," was only secondary and supplemental. Could it be maintained that the election of a bankrupt is valid, if he has not been purified to the satisfaction of the Court as required by the by-law? A freeman who has "become insolvent" is put on precisely the same footing. In either case the ineligibility, according to the terms of the by-law, is dispensed with, not by his having, in point of fact, paid his creditors in full, but only in case the Court shall be satisfied that he has so done, or that he has gained an honourable character for seven years subsequent to his insolvency. The latter alternative gives rise to a further difficulty as to ascertaining the \* period of time \* 448 at which his assets became insufficient to cover his liabilities, and from which therefore the seven years are to be calculated. On these grounds I incline, strongly, to be of opinion that a per-

son has not "become otherwise insolvent" within the meaning of the by-law, unless he has compounded with his creditors, or otherwise publicly failed in business. And if this be so, it is plain that the by-law does not apply to the present case.

But if the words of it will not allow of this construction, and it is to be read as applicable to every freeman who has become "insolvent" in the sense of "a man who is unable to pay his debts," I think the by-law is unreasonable, and therefore bad. For it will reach, as I before remarked, not only the case of a freeman who is insolvent when elected a member of the Court, but also the case of one who at some prior time was without assets sufficient to meet his liabilities, and who has subsequently, without this state of his affairs having ever been divulged, fully recovered his solvency. And it is unreasonable, I think, to deprive such a man of the eligibility conferred on him by the charter, unless at the price of his proclaiming his prior insolvency to the assistants, and proceeding to satisfy them (if they will allow him so to do on the contingency of his future election) that he has paid his creditors in full. It must be further observed that in such a case his name has never been in any degree disgraced in the mercantile world by his insolvency, so that his being associated with the other assistants could not (as it might in the case of his having been bankrupt, or having compounded with his creditors, or the like) bring any discredit on the Court. The by-law then, being unreasonable in this respect, and being so worded as to be indivisible, is, in my  
 \*449 opinion, bad \*altogether. If this be so, it becomes unnecessary to consider whether a by-law would be good which ordained that no freeman who was not then solvent should be capable of being elected an assistant.

As to the second of your Lordships' questions, I incline to think that if the by-law was good, the plaintiff was removable under it, in the sense that, as his election was void, or at all events voidable, the defendants had a right so to treat it, and to refuse to allow the plaintiff to exercise the office. At all events no peremptory mandamus, in my opinion, should be granted; because, as it appears by the record that the election was illegal, the Court ought not to order that the plaintiff should be restored to the office. But I do not think the facts stated in the special verdict show that he was removable under the by-law, on the ground that he had been guilty of ill conduct after his election. The question which was

asked him, and which, as the verdict finds, he answered falsely, and by means thereof induced the defendants to admit him to the office, was, in my opinion, collateral to his right to be admitted. For he was not asked whether he was solvent in April, when he was elected, but whether he was solvent in the following September; a fact immaterial, in any point of view, to the validity of his election, and his consequent right to admittance.

As to the third question of your Lordships, the plaintiff, in my view of the case, had no legal claim to be heard. For he is not, I think, to be regarded as removed for ill conduct, but as having been treated as one who had no right to exercise the office, because, by force of the by-law, his election was void or voidable. On this point I agree with the judgment of the Court of Exchequer Chamber, and I think the distinction there taken is well founded.

\* As to the fourth question put by your Lordships, as I \* 450 have already expressed my opinion that the by-law is not good in law, my answer to this question must necessarily be, that I think the Court below ought to have granted a peremptory mandamus.

**LORD CHIEF BARON POLLOCK.** — My Lords, in this case I adhere to the judgment delivered in the Court of Exchequer Chamber, and for the reasons assigned for that judgment.

I may, therefore, shortly state that, first, I think the by-law is a good by-law. It appears to me to be a just and reasonable by-law to exclude from the governing body of a corporation which has the management of funds (some of which are devoted to charitable purposes) persons who by the mismanagement of their own concerns have become insolvent, and have so far forfeited their claim to public confidence in respect of pecuniary transactions. The fact that insolvency may be the result of misfortune only (there no doubt may be such exceptions, but the rule is the other way) is no answer to the objection that a bankrupt or insolvent ought not to be a fit candidate for election. A by-law that a person convicted of felony should not be elected or admitted to certain public offices of trust and honour would, I apprehend, be a good by-law, although the annals of our criminal courts unhappily record many various instances where, by perjury or mistake (especially as to identity), by blunder or misapprehension, and sometimes by the

misconduct and fatal indiscretion of the accused himself, a conviction has taken place, which has been considered, upon further investigation, to be erroneous.

With respect to the second question. It appears to me \* 451 that, assuming the by-law to be good in law, inasmuch \* as according to the special verdict the said Kay Dinsdale "induced and procured by means of false and fraudulent representations the wardens and assistants to admit him," the said admission was voidable, and might be treated as void by the Court of Assistants; and there was no occasion to remove him. On the third question, my answer will be that the plaintiff was not to be considered as removed, as he had never been legally a member of the Court. I consider that his admission was cancelled or set aside as having been obtained by fraud. He had a right to be heard on a mandamus to admit him, as no doubt he had been elected, and that, in my opinion, is the shape the proceedings ought to have taken.

On the fourth question of your Lordships, I have only to say, as the result of the opinions I have already expressed, that, having regard to the facts stated in the verdict, the Court below ought not to have granted a peremptory mandamus. The authority for this has already been cited. *The King v. Griffiths*.<sup>1</sup>

LORD CHIEF JUSTICE COCKBURN. — My Lords, I am of opinion that the first question put by your Lordships in this case should be answered in the negative.

I must begin by observing that I have always had considerable difficulty in understanding how, when the constitution of a corporation is fixed by charter, a power to make by-laws "for the good rule and government" of the body could ever properly be held to carry with it a power to limit the number either of the electors, by whom the members of any constituent part of the corporation \* 452 are to be chosen, or the number of those from \* whom the election is to be made, by superinducing any new qualification or ground of disqualification as to which the charter is silent. I should be disposed to consider a power to make by-laws "for the good rule and government" of the body, as relating rather to matters of an executive character, connected with the government, discipline, and management of the corporation, and

<sup>1</sup> 5 B. & Ald. 781.

the conduct of its affairs, than to alterations in the constitution established by the charter of the sovereign, or in the mode of filling up the component parts of the corporate body thereby prescribed. Without, however, dwelling on this debatable ground, or further troubling your Lordships on this subject, I will content myself with saying that any by-law, the effect of which is thus to modify the constitution given by the charter, should be looked at with jealousy, and upheld in a Court of law only if it manifestly appears to be necessary and conducive to the well-being of the corporation; if, to use the words of this very charter, it shall be proved to be "good, useful, honest, and necessary." Now this by-law, as it seems to me, is plainly unnecessary, and — worse than useless — is positively mischievous. It is unnecessary, because the body in the corporation in which the power of making by-laws is vested is the very same body by which the election of an assistant is to be made; so that if the principle upon which the by-law is based be sound, these persons can give practical effect to it by rejecting any one labouring under the disqualification, whether the by-law exists or not. So long as the by-law remains unrepealed it must be taken that the members of the legislative body in the corporation are of opinion that its principle is good. If so, it is to be presumed that, in their character of electors, they would give effect to it.

The by-law is, therefore, plainly superfluous. \* Let us see \* 453 whether it is useful and good. Now the grounds on which this by-law has been said to be reasonable are, that the office of assistant is in itself one of trust and confidence; that it leads, if the ballot shall so determine, to the office of renter warden, an officer who is the treasurer of the corporation, and keeps its funds; that bankruptcy and insolvency, in the great majority of instances, arise from misconduct or imprudence; that the corporation is justified in taking measures for insuring that its government, and especially the management of its pecuniary affairs, shall be in the hands of solvent and respectable persons.

While the force of this reasoning may be admitted, it is, on the other hand, to be observed that the effect of such a rule must necessarily be, in some instances, to exclude persons upon whom bankruptcy or insolvency may have come from circumstances involving no imputation either of misconduct or improvidence. The vicissitudes of fortune, the fluctuations of trade, the uncertainty of commercial speculation, the failure of others, causes

which sometimes prove "enough to press a royal merchant down," may occasion bankruptcy or insolvency, without leaving the shadow of a reproach on the character of the individual. Why should a man thus circumstanced, on whom no suspicion or imputation rests, be excluded till he has established a fair and honourable character for seven years, when, to say nothing of the hardship and injustice done to him, his admission into the governing body might, during all that time, be highly advantageous to the corporation? The answer which has been given is that laws should be adapted to cases of ordinary and not of exceptional occurrence, and that if general good results, individual hardship or partial inconvenience must be submitted to. I should feel all the

\*454 \*force of this argument if this by-law were necessary to secure the advantage which it is designed to effect. But, as I have already shown, for this purpose it is altogether unnecessary; and its practical working is, therefore, this: while unnecessary to exclude those whom it may be desirable to exclude, it only operates to exclude those whom it is acknowledged it would be desirable to admit. The law is, therefore, not only useless but mischievous.

But even if this by-law could be taken to be good in law, I am of opinion that the prosecutor was not removable under it. When the by-law in question speaks of bankruptcy or insolvency, it must, I think, be taken to refer to something more than a mere inability to meet pecuniary liabilities or engagements. "Bankruptcy," in the meaning of the by-law, must, I think, be taken to mean the legal status in which a man becomes placed when he has committed an act of bankruptcy, and is thereupon adjudicated a bankrupt. "Insolvency," a man's position when he becomes subject to the laws relating to insolvents, and is brought within the jurisdiction of the insolvent laws. For although at the time of the making of this by-law the Insolvent Court of modern times had not been called into existence, yet there were statutes relating to insolvent debtors, and the term was one known to the law. How, unless some such positive standard is taken, can the period be fixed from which the seven years are to run, during which the good character required by the by-law is to be maintained? The fact that this latter period is made to date from the bankruptcy or insolvency, is strong to show that these terms are used in the sense I have ascribed to them, and not as importing a mere inability to

meet pecuniary liabilities, the precise date of which it may be difficult to ascertain, which may exist to-day and be removed to-morrow.

\* But if this be so, Mr. Dinsdale was not ineligible at \* 455 the time of his election ; he was elected on the 23d of April ; his election was confirmed at a meeting of the 25th of July ; he was admitted on the 20th of October ; he was not declared bankrupt till the 30th of November. It does not appear that he had even committed an act of bankruptcy prior to his election and admission. In my opinion, therefore, even supposing the by-law to be good, he was not disqualified under it.

And even if this were not so, I am still of opinion that it was not competent to the defendants to remove Mr. Dinsdale. He had been elected by the proper electors ; his election had been duly confirmed ; he had been admitted ; he had been twice summoned to attend and discharge the duties of his office, and had done so, and had partaken of its emoluments. Under these circumstances, he was to all intents and purposes in the office ; and if removable at all, on the ground of having been ineligible under the by-law, could only be removed by proceedings in the nature of *quo warranto* in the Court of Queen's Bench.

But his removal is said to have been warranted on the ground of misconduct, in making a false answer to an inquiry by the officer of the corporation touching his solvency prior to his admission. To this it appears to me that more than one answer may be given. In the first place, although the effect of the prosecutor's statement was his admission, it does not appear that the answer was made with any reference to admission to the office, or was intended as a fraud on the corporation. It is found expressly as a fact in the case that Dinsdale, at the time of making this statement, was not aware of his having been elected. The inquiry may have presented itself to his mind simply as an impertinent one. The answer may \* have been given with the design of protect- \* 456 ing himself from the injurious consequences to his position as a trader, which the disclosure of his pecuniary circumstances might bring upon him. Secondly, the inquiry was one which neither the defendants nor their officer on their behalf had any right to make, and by the answer to which the prosecutor, therefore, ought not to be prejudiced. If the by-law is, as I think it, bad, the inquiry was irrelevant and unwarranted. If the by-law



was good, the inquiry came too late; it should have preceded the election; for when an election has once been made by those to whom it appertains to make it, the admission to the office becomes a purely ministerial act. It would be an additional reason for holding this by-law to be bad, as unreasonable, if upon an election made by competent authority, it superinduced a new qualification as the condition of admission. The defendants are, therefore, under the necessity of contending, that though the by-law speaks of admission, the disqualification is carried back to the period of the election. If so, this question as to solvency, if it could be legitimately put at all, should have been put antecedently to the election. Once elected, Mr. Dinsdale might have declined to answer such an inquiry, and yet have been entitled to insist upon being admitted.

But a short and conclusive answer to this alleged ground of removal is to be found in the affirmative answer which must necessarily be given to the question put thirdly by your Lordships. No proposition in the law relating to corporate offices can be more clear or indisputable than that a man liable to removal from an office for misconduct, is entitled to be heard in his defence, and must have an opportunity of being so heard before he can be removed. It is unnecessary to trouble your Lordships with \* 457 authority on a proposition which needs only \* to be stated to command assent. The cases will be found collected in "Wilcocks on Corporations," paragraphs 691 to 702.

Being, on these grounds, of opinion that the removal of Mr. Dinsdale was unwarranted, and that he is entitled to a peremptory mandamus to restore him, I have no hesitation in answering your Lordships' fourth and last question in the affirmative.

July 28.

THE LORD CHANCELLOR (LORD WESTBURY).—My Lords, the question in this case depends almost entirely on the validity of the by-law; and, again, the validity of the by-law appears to me to depend on the meaning of these words, namely, "or become otherwise insolvent." With respect to the construction of these words, I think they must be held to mean notorious or avowed insolvency, such as would be the consequence of a public stoppage in business, or of a trader calling his creditors together and obtaining time or terms of indulgence, or of his entering into

a deed of composition. These, and other modes of avowed insolvency, were common at the time of the passing of this by-law, although no statute relating to insolvent debtors as contradistinguished from bankrupts was then in existence. This construction of the word "insolvent," as meaning avowed or notorious insolvency, is consistent with the provision for restoring the competency of the trader, if he has established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency; where the word "insolvency" must mean a fact ascertained at some period of time from which the seven years may be computed. Thus, fairly construed, I think the by-law is good and reasonable, and that it does not contain any element of uncertainty.

\* If this be the meaning of the by-law, Mr. Dinsdale was \*458 not insolvent, within such meaning, at any time before the date of his election or admission, and was not, therefore, in my judgment, disqualified by the operation of the by-law.

It is unnecessary to consider the case of fraud alleged in the return, because I understand the return and finding of the jury to be intended to state that Kay Dinsdale, being ineligible within the true meaning of the by-law, did by means of false and fraudulent representations of his solvency, induce or procure the wardens or keepers and assistants, to admit him to the office. But if it had been necessary, I should have been of opinion that the answers given by Mr. Dinsdale, on the 24th September, 1849, to the questions put to him by Mr. Clarke (who was not directed or authorised by the Court to make any such inquiries), were not such false and fraudulent representations as the Court of wardens and assistants could allege were made with the view of inducing or procuring them, and by which in fact they were induced and procured to admit Mr. Dinsdale to the office. Mr. Dinsdale was elected in the month of April, 1849, and his election was confirmed in the month of July, 1849. He was admitted to the office on 20th October, 1849, and the return states that on the 20th December, 1849, the Court of wardens and assistants did resolve and determine that Mr. Kay Dinsdale should be removed and discharged from being, and should no longer be, one of the assistants of the art or mystery. Mr. Dinsdale was not summoned, nor was any opportunity afforded to him of being heard against this order of removal, which does not treat the original election as void on the ground of Mr. Dinsdale being ineligible.

Under these circumstances, I am of opinion that even  
 \* 459 \*if my construction of the by-law be not the right one,  
 and if Mr. Dinsdale was disqualified by insolvency, yet  
 that, as he was admitted to the office without fraud, he could  
 not be legally removed from it without being heard in his de-  
 fence.

I am, therefore, of opinion that the judgment of the Court of  
 Exchequer Chamber ought to be reversed, and that of the Court of  
 Queen's Bench affirmed, and that a peremptory mandamus should  
 issue.

LORD CRANWORTH. — My Lords, in this case the learned Judges  
 whose assistance we had at the argument, are divided, almost  
 equally, in opinion as to the judgment which your Lordships ought  
 to pronounce. Three of them think judgment ought to be given  
 for the plaintiff in error; four that the judgment below ought to  
 be affirmed.

I have given careful attention to their able and well-considered  
 reasoning, and have arrived at the conclusion that the judgment of  
 the Court of Queen's Bench was right, and so that judgment  
 ought to be given for the plaintiff in error.

On the question of the validity of the by-law, I concur with the  
 judgment of the Exchequer Chamber, and of the four Judges who  
 think that judgment right. I think the by-law is good. I think  
 so, because I interpret the word "insolvency" to mean not mere  
 inability of the person to whom it refers to pay his debts in full,  
 but inability proved by some outward act, such as stopping pay-  
 ment, or compounding with his creditors. That such is the mean-  
 ing seems to me clear, from the provision that the disqualifying  
 effect of the insolvency may be removed by fair and honour-  
 able conduct, continued for seven years after the insolvency.

\* 460 This necessarily points \* to some specific act, from which  
 the seven years may be counted, and this interpretation is  
 strongly confirmed by the word being coupled with bankruptcy.  
 Upon any other interpretation of the word, I should not think the  
 by-law good. If the insolvency contemplated by the by-law was  
 mere inability to pay his creditors 20s. in the pound, at any time  
 within seven years next before the election, a door would be opened  
 to inquiries which it might be impossible to answer, and which it  
 would be impolitic to permit. On the validity of the by-law, there-

fore, I concur with the judgment of the Court of Exchequer Chamber.

But I do not think that the special verdict finds any such insolvency as is contemplated by the by-law. It finds, indeed, that from the time of the passing of the resolution of the 23d of April, 1849, electing the appellant to be an assistant, up to the meeting of the 20th of October following, when he was admitted and sworn in, he was in insolvent circumstances, and unable to pay his creditors 20s. in the pound, and that he was indebted on judgments and otherwise, in large sums of money to divers persons.

This, however, does not show that he was insolvent within the meaning of the by-law. It does, indeed, show that when, on the 24th of September, he represented to Mr. Clarke, the agent of the company, that he was as solvent as any man of the Court, and able to pay his creditors 20s. in the pound, he was stating what was untrue, and what he must have known to be untrue. But I cannot think that the mere statement of a falsehood, even though it has been made with the intention of thereby inducing, and has in fact induced, the company to admit him, can have the effect of making the election a nullity.

\* If he had been bankrupt within seven years previously \* 461 to his election, and had falsely represented to the company that he had never been bankrupt, that would have been a false representation that he was eligible, when in truth he was ineligible, and I will assume that such a falsehood would have rendered his election a nullity. But a mere false representation not affecting his eligibility would not have that effect. If, for instance, being solvent, he had falsely represented himself as worth 10,000*l.*, when in truth he was worth only 100*l.*, this false representation might have led to his being elected, but it could not have made the election a nullity; and the representation that he was not insolvent, using that word in a sense different from that in which the word "insolvency" is used in the by-law, is merely the statement of a falsehood to the question whether he was or was not eligible; and, therefore, even if it would afford ground for setting aside the election, it did not, in my opinion, make it absolutely null and void, *ab initio*.

This view of the case makes it unnecessary for me to consider the other questions raised in argument. It is impossible to contend that a person validly elected and admitted a member of the Court,

could behind his back, and without notice, be removed from his office. And it seems to me necessarily to follow, that judgment must be given for the plaintiff in error, and that a peremptory mandamus ought to issue.

I ought to state that my noble and learned friend, Lord Brougham, who is unable to be present here to-day, has authorised me to say that in all these cases which he heard (with the exception of one at the hearing of which I was not present), he concurs with us in our views respecting them.

\* 462     \* LORD WENSLEYDALE. — My Lords, the first question in this case is, whether the by-law upon which the case principally depends is reasonable, and therefore valid, or not.

The wardens and assistants have a power by their charter to make by-laws, which they shall think fit, in their sound discretion, for the good rule and government of the wardens, &c. of the mystery of saddlers. Under that power I do not feel the difficulty which has presented itself to the minds of some of the Judges, that the body could not limit the number of the persons to be elected by superinducing new qualifications as to which the charter is silent. To secure the good government of the company, it might be proper to make fit provisions that those who have the rule and management of the affairs of the company should be well qualified; and it is very reasonable that those who are to have the care and custody of the moneys of the company should be trustworthy and respectable.

I think, therefore, that there is no objection to a by-law requiring that those elected and admitted to be assistants, who may, and in the ordinary course of things will, become renter wardens, and as such have the custody of the moneys of the company, should not be persons who have been bankrupts, unless it be proved that after their bankruptcy they have paid their creditors in full, or established a fair and honourable character for seven years after their bankruptcy to the satisfaction of the Court. In this respect I have no doubt as to the validity of the by-law. Whether it is equally valid in the case of insolvency is the question; and that depends upon the meaning of that term in the place in which it occurs. If it means only secret insolvency, that is, if at any

\* 463     time, in case a person's liabilities and assets were \* reckoned up and compared together, in that comparison he was found

to be incapable of paying all his creditors, I must think the by-law is invalid. There would be great inconvenience from such an inquiry into private affairs. It is clear, besides, that the by-law means such an insolvency as is manifest publicly, for from a secret insolvency the period of seven years cannot be well calculated; and therefore there is good reason for saying that a different kind of insolvency is intended. I cannot help thinking it quite clear that the term "insolvent" means public insolvency; not necessarily the taking the benefit of, or being made liable to, the Insolvent Act, but being incapable to pay his debts in ordinary course; or, in other words, having "stopped payment." In that sense, I think the by-law perfectly reasonable, and the seven years may be easily calculated from such an insolvency. Mr. Justice Willes has referred to several cases to show that such is the true meaning of the word. It may at least mean "not paying" as well as "being incapable of paying." As in one sense of the word the by-law is good and in the other not, the rule is that it ought to be construed so as to make it valid, not to defeat it, according to the principle laid down in the *Poulterers' Company v. Phillips*.<sup>1</sup>

I think, therefore, that the by-law is good in law, on the supposition that public insolvency is meant by it.

Was the plaintiff, then, removable under this good by-law, upon the facts stated in the return and found by the special verdict? I think there is no substantial difference for this purpose between being admitted, or, elected and admitted. The by-law in substance forbids him from being permitted to be a member of the Court of \* Assistants. If the office had been full he \*464 could not have been removed without a *quo warranto*. That is perfectly clear. But the grounds upon which the defendants appear to have intended to proceed are, that the relator was elected and admitted by means of a fraud committed by himself upon the company; that the office was never full, but was voidable by reason of the fraud; that fraud makes all transactions voidable at the election of the party defrauded, as long as the parties remain in the same condition, not when new interests are acquired; and that here there is none so acquired; and that if there was a fraud, and the transaction was avoided on that ground, a notice would be unnecessary to the fraudulent party to come and defend himself in

<sup>1</sup> 6 Bing. N. C. 314.

order to make the avoidance operative ; and I am clearly of opinion that it would.

The fraud meant to be relied upon in the return is a false and fraudulent statement by the relator as to his solvency. He is alleged to have falsely and fraudulently stated, both before his election and his admittance, that he then was solvent and able to pay his creditors 20s. in the pound, whereas he was then insolvent, and unable to do so.

The allegation that such statement was made before his election is not attempted to be proved. There is nothing in the special verdict to support it. But that allegation may be rejected ; and if the statement of a fraud, as alleged before the admittance, according to the true meaning of the allegation, is made and proved, the return would be sufficient.

In order, however, to make this a valid objection to the admittance after election the return should have stated an insolvency within the true meaning of the by-law. If a false and fraudulent statement, perhaps on any subject, had been made, which \* 465 had caused the election \* to take place, probably the election might have been avoided by that fraud. But a fraudulent statement after election, in order to avoid the admittance made on that election on the ground of insolvency, must be a statement of such an insolvency as to create a disqualification under that by-law. That insolvency must be, not a private and secret insolvency, not a mere incapability on the full statement of his affairs to pay, but a public one, a stoppage of payment in the ordinary course, or a similar act.

I have had a good deal of doubt on this point, but, after much consideration, I have come to the conclusion that the return does not state that there ever was an insolvency of that character. I think it probable that the framer of it had no notion that a public insolvency was at all necessary in order to bring the case within the prohibition of the by-law. The allegation is that the relator falsely and fraudulently stated to the wardens and assistants that he then was solvent and able to pay his creditors 20s. in the pound, whereas he then was insolvent, and unable to pay his creditors 20s. in the pound, and that they never have been paid. That he was solvent at the time of making the statement does not, in the ordinary use of language, appear to mean that he had not then ceased to pay in the ordinary course, or had not stopped payment,

or become insolvent within the meaning of the by-law, but merely that he then was capable of paying in full. And the proof of that representation which is stated in the special verdict confirms that view of the meaning of the allegation in the return; for it is said that it was made on the 24th September, 1849, in answer to an inquiry by Clarke, the agent of the Court, as to the relator's solvency, and it was a statement that he then was as solvent as any man of the Court, and able to pay his "creditors" 20s. in the pound, whereas he \* then was, and has hitherto been in- \* 466 solvent. He was not asked whether he had ever become an insolvent or stopped payment.

On the ground that the return does not allege a case of public insolvency, and a fraudulent statement on that subject, I think it is bad, and therefore that the judgment of the Court of Exchequer Chamber ought to be reversed, and a mandamus ought to go.

It is unnecessary to consider whether the special verdict finds sufficiently that such statement was made to the wardens, keepers, and assistants, as alleged in the return, being made only to Clarke, or that they removed the relator for that cause. It is sufficient for the decision of the case that the return is bad.

**LORD CHELMSFORD.** — My Lords, the question in this case turns upon the validity of the by-law, for if that is invalid all the proceedings founded upon it must necessarily fail. This question entirely depends upon the meaning which is given to the words, "or become otherwise insolvent." If they mean that no person shall be a member of the Court of Assistants who at any previous time, if called upon suddenly by his creditors, would have been unable to pay them 20s. in the pound, a state of circumstances scarcely capable of being reduced to precision, always fluctuating and uncertain, and not necessarily determining the solvency of a tradesman according to the notions of the commercial world, then the by-law would be unreasonable and void. This would of course not be the case if the words are to be understood as importing insolvency in the strictest acceptation of the term, either by taking the benefit of the Insolvent Act, or by compounding with creditors; but if this is the proper interpretation \* of the \* 467 by-law, it would not have been applicable to Mr. Dinsdale at the time of his admission. But I think that a reasonable con-



struction may be adopted, which will both establish its validity, and bring Mr. Dinsdale's case within it. The words are not "has been a bankrupt or insolvent," but, "has been a bankrupt, or become otherwise insolvent," which appear to me to point with sufficient precision to a state of circumstances which in a popular sense implies an insolvent condition ; as where a person (to use a familiar expression) is unable to pay his way, or to discharge his debts in regular course according to the habits of business of solvent tradesmen. This is an overt act of insolvency which is capable of distinct and definite proof as occurring at any particular time.

The by-law, therefore, is not objectionable on account of uncertainty, and this construction of it gives a precise period from which the inquiry by the Court of Assistants may commence, whether the person seeking admission to the Court has paid and satisfied his creditors, or has established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency. This provision, intended to mitigate the rigour of the by-law, and to allow a failing man, even where he has not paid his debts in full, the benefit of the favourable consideration of the Court of Assistants after a period of purgation, is thus cleared of all difficulty, and the inquiry has a certain and definite range and object. The by-law therefore appears to me to be valid ; and if the fact of such insolvency as it contemplates had been established against Mr. Dinsdale at the time of his election, he would not have been eligible to the Court of Assistants.

But assuming him to have been ineligible, was it in  
 \* 468 \* the power of the Court of Assistants, by their resolution of the 20th December, 1849, after his election and admittance, to remove him from his office ? I think it was not.

I do not understand the word "admitted" to be used in the by-law to signify "admission," as contradistinguished from "election," but as a general and comprehensive word, equivalent to "become" or "be" a member of the Court. Now, suppose Mr. Dinsdale to have been in insolvent circumstances within the meaning of the by-law, but to have concealed the fact, and to have been admitted in ignorance of it, it can hardly be contended that upon a subsequent discovery of the state of his affairs, he could have been removed. The case against him is put upon the ground of fraud. "It is alleged in the return, and found by the jury, that

by means of the said false and fraudulent representations (of his solvency) the said Kay Dinsdale induced and procured the wardens or keepers and assistants to admit him to the office."

Now the false and fraudulent representations referred to are those which are found to be made to Mr. Clarke, the clerk of the company, on the 24th September, 1849, long after the election of Mr. Dinsdale (which was on the 23d April, 1849, and confirmed on the 25th July, 1849), and before it was communicated to him, or he was summoned or admitted to the office. It is not even positively and directly alleged that Clarke communicated Dinsdale's representation of his solvency to the wardens and assistants of the company before his admission. But the special verdict states argumentatively that "the said representations were not communicated to any Court of the then wardens and assistants until the 20th day of \*October, 1849, which was the \*469 first Court of the said wardens and assistants held after the said representations were so made as aforesaid."

But suppose it to be sufficiently averred that Clarke informed the Court of the wardens and assistants of the representations of Dinsdale before he was admitted on the 20th October, 1849, how would this justify the finding of the jury that Dinsdale, by his false and fraudulent representations, induced and procured the wardens or keepers and assistants to admit him to the office? The representations to Clarke might be false, but they could not be called fraudulent, unless a misrepresentation of his circumstances by a tradesman, in answer to unauthorised inquiries, deserves that designation, or unless Dinsdale made the statement to Clarke in order that it might be communicated to the Court of wardens and assistants, which, as the fraud charged is one upon the Court, ought not to have been left to conjecture (however probable), but should have been distinctly alleged. The mere communication of the fact, therefore, by Clarke to the Court, though he is clerk to the company, goes no further to the establishment of a fraud upon the Court by Dinsdale, than if a stranger had repeated what he had heard from Dinsdale in the course of a casual conversation. The wardens and assistants might have been induced by the representations communicated to them, to admit Dinsdale to the office; but it cannot with propriety be said that he induced and procured them by his representations so to admit him.

But let it be assumed that Dinsdale made the communication to Clarke in order that it might be communicated to the wardens and assistants, with the view of deceiving them, and obtaining his admission to the office of assistant, and that his election \* 470 was therefore void *ab initio*, \* what course ought the wardens and assistants to have pursued? There can be no doubt that they should have treated the election of Dinsdale as a nullity, have refused to recognise him for a single instant as an assistant, and have proceeded at once to a fresh election. Instead of adopting this course, they treated him as a person actually elected and admitted, and by their return state that on the 20th December, 1849, at a meeting of the wardens or keepers and assistants, they did “resolve and determine that the said Kay Dinsdale should be removed and discharged from being, and should no longer be, one of the assistants of the said art or mystery,” words which necessarily import that he had been admitted, and that he was actually one of the assistants at the time of the resolution.

But even assuming that the wardens and assistants were entitled to annul the election and admission on account of Dinsdale’s insolvency, yet, according to the allegations in the return, they did not proceed at all upon this ground, but upon his bankruptcy afterwards. They might have treated the bankruptcy, and the insignificant dividend which he paid upon it so soon after his admission, as proof of his insolvent circumstances at the time, but in itself it was no ground of removal under the by-law.

It appears to me to be clear, from the language of the return, that the bankruptcy was the real cause of Dinsdale’s removal. It states, that after his election and admittance, he was adjudged a bankrupt, assignees of his estate and effects were appointed, “and the said adjudication and bankruptcy have thence hitherto remained in full force and effect, and the said wardens or keepers and assistants did thereupon, and whilst the said Kay Dinsdale was such bankrupt as aforesaid and wholly insolvent, re- \* 471 solve and determine that he should be removed \* and discharged from being, and should no longer be, one of the assistants of the said art or mystery.” I cannot understand this in any other way than that upon his becoming bankrupt the Court resolved that Dinsdale should be removed from being an assistant. Now it is unnecessary to say that under the by-law they had no power to remove for bankruptcy or insolvency, subsequent to ad-

mission. And if they removed him for this cause, which was clearly illegal, I do not think they could set up the previous insolvency as a justification, on the ground of its rendering the election altogether void ; or if they could, they should have distinctly averred it for cause in their return, in order that it might be traversed and tried.

As I am so clearly of opinion that the removal of Dinsdale cannot be justified, it seems unnecessary to consider the other questions, but I cannot forbear one or two remarks upon the arguments as to the supposed right to remove without previous summons and hearing. If Dinsdale's election was void, *ab initio*, on the ground of fraud, no doubt his case might have been summarily dealt with, and his admission cancelled without a hearing ; because he would never have been a member of the Court, and would have had no *locus standi* to be heard. But if he was actually in office (as the return admits) and was to be removed from it for cause, it seems to be an invariable rule of justice that he should not be condemned unheard, and the Court had no right to assume that he would have no cause to show against his removal. I think that in this respect the proceedings of the Court of Assistants are open to objection.

I agree, therefore, with the Court of Queen's Bench, that a peremptory mandamus ought to issue in this case. \* I \* 472 admit the good sense of the remark in the case of *The King v. Griffiths*, that it is idle to grant a mandamus to restore where the party could be removed again immediately. But I do not see how this could be the case with Mr. Dinsdale under the by-law, either upon his subsequent bankruptcy or insolvency, or on account of his insolvency, if existing at the time of his admission, there being no proof of any fraud designed or practised by him on the Court of Assistants, the only ground upon which he could have been deprived of his office, after a regular election and formal admission.

I agree with my noble and learned friends that the judgment of the Exchequer Chamber ought to be reversed, and that of the Queen's Bench affirmed, and that a peremptory mandamus ought to issue.

*Judgment of the Court of Exchequer Chamber reversed ; and judgment of the Queen's Bench affirmed.*

Lords' Journals, July 28, 1863.

\*473 \*PEEK v. NORTH STAFFORDSHIRE RAILWAY CO.

1862. July. 1863. April 14; July 29.

WILLIAM PEEK, . . . . . Plaintiff.  
The Directors, &c. of the NORTH STAFFORDSHIRE }  
RAILWAY COMPANY, . . . . . } Defendants.

*Carriers' Liability. Railway Companies. "Conditions." "Special Contract."* 11 Geo. 4 & 1 Wm. 4, c. 68. 17 & 18 Vict. c. 31, § 7. *Pleading.*

All the parts of the seventh section of the "Railway and Traffic Act, 1854," must be read together, and therefore the conditions there spoken of as capable of being imposed by railway companies in limitation of their liability as common carriers must not only be, in the opinion of a Court or Judge, just and reasonable, but must also be embodied in a special contract in writing, signed by the owner or sender of the goods.

The owner of some marble chimney-pieces desired to send them to London. Messages and notes passed between him and the agent of a railway company on the subject of the terms on which they were to be carried. The agent stated, as a condition, that the company would not be responsible for damage to goods sent by the railway, unless their value was declared and they were insured, the rate of insurance being fixed at ten per cent. on the declared value. After some delay the agent received a note requesting that the marbles might be forthwith sent to London "not insured"; they were sent, and suffered damage:—

*Held* (diss. Lord Chelmsford), that the condition thus sought to be imposed by the company was not just and reasonable; that there was not any special contract signed by the parties within the meaning of 17 & 18 Vict. c. 31, § 7; that the note could not be connected with the other communications so as to constitute the required contract; that the words "not insured" could not be made the subject of explanation by parol evidence; and that they left the rights and liabilities of the parties as at common law.

Per LORD CRANWORTH. — The burden of showing that a condition is just and reasonable lies on the railway company.<sup>1</sup>

The defendants pleaded that the goods were carried on a just and reasonable condition, made by them and assented to by the plaintiff, that they should not be liable for loss or injury unless the goods were insured according to value, and that they were not insured:—

Per LORD WENSLEYDALE. — This is a plea in bar to the whole cause of action in respect of damage, however caused.

*Simons v. The Great Western Company* (18 C. B. 805) confirmed.

<sup>1</sup> *Great Western R. Co. v. Sutton*, Law Rep. 4 H. L. 236.

\*THE declaration in this case stated that the defendants \*474 being common carriers for hire, the plaintiff delivered to them as such common carriers three marble chimney-pieces to be carried from Stoke-upon-Trent to London, and that the defendants so negligently carried the same that they were greatly damaged.

There were several pleas, of which the 4th and 5th alone require now to be noticed.

4th plea. That the goods in the declaration mentioned were delivered and received by the defendants, to be carried after the passing of the Railway and Canal Traffic Act, 1854,<sup>1</sup> and under and subject to a certain special contract in that behalf, signed by one George Whittingham, for and on account of one Charles Meigh, who was the person delivering \*the said \*475 goods to the defendants for carriage; whereby it was agreed that the defendants should not be responsible for the loss of, or injury to marbles, unless declared and insured according to their value. And that the goods in the declaration mentioned were marbles, and that the same were not, nor was any part of the same declared or insured by the plaintiff, in the manner provided by the said agreement.

5th plea. That the said goods were delivered and received after the passing of the said Act, under and subject to a certain just

<sup>1</sup> Section 7. "Every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void. Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge, before whom any question relating thereto shall be tried, to be just and reasonable." Then followed a second and a third proviso, each of which is immaterial in this case; and the section terminated with a fourth: "Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of the 11 Geo. 4 & 1 Wm. 4, c. 68, with respect to articles of the description mentioned in the said Act."

and reasonable condition made by the defendants, and assented to by the plaintiff, with respect to the receiving, forwarding, and delivering the said goods; that is to say, that the defendants should not, nor would be responsible for the loss or injury to marbles, unless declared and insured according to their value.

Issue was taken on these pleas.

The case came on for trial before Mr. Justice Erle, at the London sittings, after Hilary Term, 1858, when the following evidence was given:—

The plaintiff, in July, 1857, was the owner of the three marble mantel-pieces, then in Staffordshire; a Mr. Meigh, of Hanley, in that county, had instructions from him to forward the same to London on his behalf by the defendants' railway. The defendants had a station at Stoke-upon-Trent, in Staffordshire, and Mr. Meigh was in the habit of delivering goods to the defendants at that station to be carried to London. On the 30th of June and the 20th of July, 1857, printed notices were delivered by the defendants to Mr. Meigh, which commenced as follows:—

“The North Staffordshire Railway Company hereby give notice that they will receive, forward, and deliver goods solely subject to the conditions hereunder stated.”

\*476 \* Among the conditions so referred to was the following, printed on the same paper:—

“That the company shall not be responsible for the loss of, or injury to any marbles, musical instruments, toys, or other articles, which from their brittleness, fragility, delicacy, or liability to ignition, are more than ordinarily hazardous, unless declared and insured according to their value.”

In July, 1857, Mr. Meigh gave directions to a carter of the defendants to call for the marble chimney-pieces which were then at Mr. Meigh's house, at Shelton, in Staffordshire, and to convey them to the defendants' station at Stoke; and at the same time he desired the carter to inquire at the station what the insurance would be. The carter fetched the chimney-pieces, and they were placed in the defendants' warehouse at Stoke; he also inquired of Mr. Corden, the defendants' head clerk at Stoke, what would be the insurance of the goods, and was told by him he did not know, unless the value of them was stated; and the carter communicated this on the following day to Mr. Meigh.

A day or two afterwards Mr. Corden wrote and sent to Mr.

Meigh, referring to the marbles which had been sent, and the message delivered by the carter, and stating that the amount of insurance depended on the value of the marbles, and requesting to know for what amount they were to be insured. No answer was sent to this note. On the 10th of July Mr. Corden received the following note from a clerk of Mr. Meigh:—

“Please inform us early what is your rate of insurance on marble, and we will give you an answer to your inquiries respecting the packages delivered to you, on receipt of your reply.”

\* Mr. Corden went to Mr. Meigh's place of business, saw \*477 his son, and told him that until the value of the goods was declared, he could not give him the rate of insurance. Mr. Meigh's son stated that he could not tell the value.

On the 16th of July, the following letter was written and sent to the Stoke station, on behalf of Mr. Meigh:—

“You will much oblige by sending me the rates of insurance on marbles as written for last week. Oblige me by informing me per bearer.”

To which the goods manager of the defendants at the Stoke station answered as follows:—

“It is necessary, before fixing the rate of insurance, that we should perfectly understand the nature and amount of risk that we are about to undertake, and I will lose no time in getting the rate of insurance fixed when you oblige me with this information. I believe you have already been informed that we cannot insure the marbles beyond London.”

No reply was sent to this letter, and nothing further passed until the 28th of July, when Mr. Whittingham, on behalf of Mr. Meigh, called at Stoke station and saw Mr. Corden, and inquired why the chimney-pieces had not been forwarded to London. Mr. Corden said that Mr. Meigh was perfectly well aware why they had not been forwarded: that he had desired they should be insured, and at the same time he did not declare the value; that Mr. Meigh had been repeatedly waited upon and asked to declare the value, and that he did not do so. Mr. Whittingham said the marble was much wanted, and asked Mr. Corden to forward it. Mr. Corden said he not could not do so unless he had written instructions from Mr. Meigh as to whether they should forward it at Mr. Meigh's



\*478 risk, \* or at the risk of the company, insured or uninsured.

That if the marble was forwarded at the uninsured rate, the company's charge would be 2*l.* 15*s.* a ton; but that if Mr. Meigh chose to have it insured, it would be 10 per cent. on the declared value in addition. Mr. Whittingham said he would see into the matter. On the 1st of August Mr. Corden received the following note, signed by Mr. Whittingham, on behalf of Mr. Meigh:—

“Please to forward the three cases of marble, not insured, as directed to W. Peek, Esq., to be called for at Camden Goods Station, London.”

On the same evening the goods were sent off by the defendants, and invoiced to Mr. Meigh, at the rate of 2*l.* 15*s.* per ton, the uninsured rate. The goods arrived at the goods station at Camden Town on the 2d of August, but no person called for them. And on the 5th of August, the following note was sent to plaintiff:—

“W. PEEK, Esq.

“The undermentioned goods consigned to you from Stoke arrived here on the 2d. We will thank you to order their removal hence as soon as possible, as they remain here at your risk.

“Your obedient servants,

“PICKFORD & Co.,

“Agents.”

Species of Goods.	Marks.	Weight.	Rate.	Paid on.	Carriage.
3 cases marble.	—	T. c. q. lbs. 1 0 0 0	55%	—	£ l. d. 2 15 —

\*479 \* On the 8th of August the plaintiff sent for the chimney-pieces (which were proved to be of the value of 70*l.* each), when it was found that they had received damage from wet, and that rust from the nails of the packages had soaked through the cases and discoloured the marble. The damage was stated to amount to 52*l.*

The defendants contended, first, that there was a special contract signed by the person who delivered the goods to the company for carriage, within the 7th section of the 17 & 18 Vict. c. 31, which sustained the 4th plea; and, secondly, that the goods were

received subject to a condition made by the company, and assented to by the plaintiff, that the company should not be responsible for injury to the goods, unless the same were insured according to their value, which was not done; that this was a reasonable condition, and that the 5th plea was proved.

The learned Judge adopted these propositions, and directed a verdict to be entered for the defendants on these pleas, but reserved leave to the plaintiff to move to enter the verdict for the plaintiff for 52*l.* in case the Court should be of opinion that this direction was incorrect in point of law.

In Easter Term a rule for this purpose was obtained on the grounds: That there was no evidence to support the 4th and 5th pleas; that the condition mentioned in the 5th plea was not a just or reasonable condition within the meaning of the 17 & 18 Vict. c. 31, but was an unjust and unreasonable condition; that no written or signed contract sufficient to satisfy the statute was proved; that the 4th plea did not show any such contract; and that the 4th and 5th pleas were bad.

Cause was shown, in Trinity Term, before Lord Campbell, Mr. Justice Coleridge, Mr. Justice Erle, and Mr. \*Justice \*480 Crompton. Mr. Justice Coleridge retired from the bench before judgment was delivered. The rule was made absolute, Mr. Justice Erle *diss.*<sup>1</sup>

The decision of the Court of Queen's Bench was, on appeal, reversed in the Exchequer Chamber<sup>2</sup> by Lord Chief Baron Pollock, Mr. Baron Martin, Mr. Justice Willes, Mr. Baron Watson, and Mr. Baron Channell; Mr. Justice Williams expressing his opinion that it ought to be affirmed.

This appeal was then brought.

*Mr. Gordon Allan* and *Mr. Henry James*, for the appellant. — The first question here is, whether under the 7th section of this statute each plea is to be treated as presenting a separate and distinct matter of defence. The contention of the defendants is that it is to be so treated, that the first proviso in the section relates to conditions imposed by the company, and assented to by the customer, that such conditions were imposed here, and that they were reasonable, and so the 5th plea was made out; and that there was a special contract duly signed between the parties, which exempted the

<sup>1</sup> Ellis, B. & E. 958.

<sup>2</sup> Ellis, B. & E. 986.

company from liability if the goods were not insured, and that so the 4th plea is made out. And in order to show the existence of a special contract, the defendants claim to connect the various letters of their servants with the letter of the plaintiff's agent, which directed the transmission of the goods. The plaintiff denies this contention in every respect.

The effect of the section will be best understood after

\* 481 \* a short review of what the law was before this statute was passed. Before the Carriers' Act, 1 Wm. 4, c. 68, common carriers were bound to carry, for proper fee and reward, and their liability for loss was in the nature of that of insurers. They endeavoured to limit this liability by notices. The attempt to do this often led to inconvenience and injustice, and the 1 Wm. 4, c. 68, was passed, which fixed the extent to which their liability should be limited, and specified the manner in which alone that could be effected. In cases not within the Act, the liability of carriers was left as at common law, and no notice they might give could affect it. Several decisions took place on that statute. In *Wyld v. Pickford*; <sup>1</sup> *Shaw v. The York and North Midland Railway Company*; <sup>2</sup> *Carr v. The Lancashire and Yorkshire Railway Company*; <sup>3</sup> and *Walker v. The York and North Midland Railway Company*; <sup>4</sup> the conditions and notices were treated as constituting a special contract, relieving the carrier from liability; in one case even from liability "for any injury however caused"; the assent to the conditions, implied in the knowledge of them, was taken as an entering into a special contract absolutely binding between the parties. This was felt to be a very unsatisfactory state of the law, and in the year 1854, the 17 & 18 Vict. c. 81, called "an Act for the better regulation of the traffic on railways and canals," was passed. This statute made it the duty of railway companies to carry on their traffic without unreasonable delay and without partiality, and powers were given to the Judges to make regulations for carrying the Act into effect. Then came the 7th section, which in the first instance declared that companies should

\* 482 be liable for any injury to animals or \* goods arising from negligence or default, notwithstanding any notice to the contrary, and every such notice was declared to be null and void. The section contained four provisoes, the first of which declared

<sup>1</sup> 8 M. & W. 443.

\* <sup>7</sup> Exch. 707.

<sup>3</sup> 13 Q. B. 347.

<sup>4</sup> 2 Ellis & B. 750.

that companies might still make such conditions as to carrying animals or goods, as a Court or Judge should deem reasonable, and the fourth declaring that no special contract should be binding unless it was signed by the party delivering the animals or goods.

It is clear that the enacting part of this section, and the various provisoes in it must be read together. Conditions declared by the company and accepted by the sender of the goods, form a special contract between the parties, and were always so treated. A special contract is a condition with assent. The conditions must now be reasonable, and all that the fourth proviso does is to secure the best evidence of the adoption of those conditions, by requiring the signature of the customer. It has not made any distinction between the conditions mentioned in the first part of the section and the special contract mentioned in the fourth part. In the enacting part of the 7th section, it is declared that the general liability of the company shall not be limited by "any notice, condition, or declaration." In that part there is nothing to distinguish a "condition" from a "notice," and it is clear that, at any time, if a notice could not be brought to the knowledge of the sender of the goods, it could not be treated as a condition. In the first proviso the word "condition" receives the meaning of contract; it is a condition proposed by one party, and assented to by the other. A notice could have no effect, — the section prevents that, and a condition can only have effect when it assumes the character of a contract. To possess that character it must be a contract \* signed as directed by the 4th proviso. This point has not \*483 yet been specifically decided, but the Courts have acted as if such was the proper construction of the section. In *Simons v. The Great Western Railway Company*,<sup>1</sup> it was held that the 7th section does not prevent a railway company from making a special contract as to the terms upon which it will carry goods, provided it be just and reasonable, and be signed by the party sending the goods. Lord Chief Justice Jervis there expressly connected the two provisoes together, saying that by the terms of the section the company might make such conditions as were just and reasonable, "and then in order to make that binding, and to avoid all discussion, 'although it be just and reasonable it shall not be binding on the party unless it be signed by the party who is to be affected by the contract.' And therefore the section will run thus, 'General

<sup>1</sup> 18 C. B. 805.

notice to limit liability shall be null and void, but the parties may make special contracts, provided those contracts are adjudged by the Court or a judge to be just and reasonable.'” *The London and Northwestern Company v. Dunham*<sup>1</sup> is to the same effect. In the former case the contract did not appear to have been signed; in the latter it was signed. In the present case Mr. Justice Crompton<sup>2</sup> said, such conditions, whether verbal or not, can only operate by way of special contract, and he expressly adopts the opinion of Lord Chief Justice Jervis, in *Simons v. The Great Western Railway Company*. In *M<sup>c</sup>Manus v. The Lancashire and Yorkshire Railway Company*,<sup>3</sup> it was held, in the Exchequer Chamber, Mr. Justice Erle *diss.*, that the section which makes conditions void,

\* 484 unless declared \* by a Court or Judge to be reasonable, extends to cases where a special contract has been signed in conformity with the section. There, too, the decision of the Court of Queen’s Bench in this case itself was brought under the notice of the Court, and was expressly adopted by the majority of the Judges. The conditions, whatever they are, must be reduced to writing, and signed, and they must be reasonable. The condition here is not just and reasonable; it goes to the extent of relieving the defendants from all liability, except the goods are specially insured. The very object of the Legislature in both the statutes was to prevent carriers from so limiting their liability, and in *M<sup>c</sup>Cance v. The London and Northwestern Railway Company*,<sup>4</sup> a condition of that kind which declared that horses were to be carried entirely at the owner’s risk, was held not to be reasonable. Here too the rate of insurance is itself unreasonable and excessive. In *Harrison v. The London and Brighton Railway Company*,<sup>5</sup> the Court took that very matter into consideration in a case of this kind.

There is no contract here signed as required by the statute; *Leroux v. Brown*,<sup>6</sup> *Smith v. Neale*,<sup>7</sup> relied on in the Exchequer Chamber, both of which related to the Statute of Frauds, are not applicable, for this statute does not require a memorandum of the contract, but the contract itself to be signed.

The defendants are not at liberty to read all the communications

<sup>1</sup> 18 C. B. 829.

<sup>2</sup> Ellis, B. & E. 975, 976.

<sup>3</sup> 4 H. & N. 327.

<sup>4</sup> 31 Law J. N. S. Exch. 65, 7 H. & N. 477.

<sup>5</sup> 2 Best & S. 122, 152.

<sup>6</sup> 12 C. B. 801.

<sup>7</sup> 2 C. B. N. S. 67.

together as constituting one contract, and then give verbal evidence as to the meaning of the terms employed. The only signed paper here is the letter of the 1st August; it has no reference to any other \*document which cannot therefore be incor- \*485 porated with it. *Boydell v. Drummond*; <sup>1</sup> *Kenworthy v. Schofield*; <sup>2</sup> *Hinde v. Whitehouse*; <sup>3</sup> *Holmes v. Mitchell*.<sup>4</sup> In *Blackburn* on "Contract of Sale," this is stated as the result of all the authorities, many of which are there cited.

Now here the letter of 1st August stands alone; it merely says "not insured"; that cannot be connected with the other letters, and the whole together made a signed contract by such connection, for they do not refer to each other. Nor can parol evidence be given to show what ought to be taken as the intention of the parties in writing the words "not insured."

Those words are not words of a technical nature having a particular meaning, and therefore requiring explanation, but are ordinary words, used here in their ordinary signification. That has the effect of leaving the conveyance of these marbles to the operation of the common law. There is therefore no contract specifically binding the parties, and the conditions, if they are at all to be taken into consideration, are not reasonable.

*Mr. Phipson* and *Mr. Quain*, for the defendants in error. — The discussion on the 4th plea raises the question whether a condition limiting the liability of the defendants can be imposed, and its adoption constitute a special contract, and on the 5th plea, whether the condition here imposed is reasonable.

But for the 17 & 18 Vict. c. 31, the condition thus imposed and adopted would have been valid. Before the \*1 \*486 Wm. 4, c. 68, public notices were of themselves binding; that statute rendered assent to them necessary. That shows that up to the recent Act, the defendants might have limited their liability by notice, if they brought home knowledge of it to the party. Here the plaintiff, by his agents, had full knowledge of the condition as to insurance, and by the letter of the 1st August declared his willingness to take on himself the risk, expressly

<sup>1</sup> 11 East, 142. See *Ridgway v. Wharton*, 6 H. L. Cas. 238, and *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78.

<sup>2</sup> 2 B. & C. 945.

<sup>4</sup> 7 C. B. N. S. 361.

<sup>3</sup> 7 East, 558.

directing that the goods should be forwarded "not insured." That letter constituted a special contract, being in fact a written acceptance of the conditions of which the plaintiff had had notice. That reduces the question to the single point whether the condition here is reasonable. It is reasonable; the purpose of the later Act is simply to prevent such conditions as would exempt companies from liability, even in case of negligence. In all other respects the carrier has a right to say what he will carry, and to what places, and under what conditions. He may refuse to carry gold. Before this statute, a notice of terms on which alone a company would convey fish, terms which relieved the company from all liability, was proved to have been served on the plaintiff, and after that he sent fish to be carried; he was held bound by the terms, *Walker v. The York and North Midland Railway Company*.<sup>1</sup> By a general notice expressly brought home to the knowledge of the party, companies might have exempted themselves even in case of negligence. The Legislature designed to alter that, but not to take away the right of making conditions of a special kind. The proviso in the 7th section itself recognises, in terms, the possible existence of special conditions, and says nothing \* 487 of what shall be their terms. \* They must, of course, consist of stipulations made on one side and accepted on the other; stipulations privately agreed on between the parties. All that the proviso requires is, that every contract shall be in writing, and shall be signed. But that is distinguished from conditions of which the company may give public notice, and as to which the restriction is, that they shall be subject to the opinion of the Judge that they were reasonable. No such opinion is to be expressed where the party has entered into a distinct contract.

Of course, wherever there are conditions which are required to be assented to, the argument will be used that they form a special contract. That seems to raise a difficulty against the defendants in the present case, but the difficulty is not real. The 7th section has drawn a clear distinction between such general conditions so assented to, and a special contract. As to this special contract, the question of reasonableness does not exist; that question applies only to those conditions which are the subject of the first proviso of the section. *Nicholson v. The Great Western Railway Company*<sup>2</sup> affords an illustration; there the question was as to the

<sup>1</sup> 2 Ellis & B. 750.

<sup>2</sup> 5 C. B. N. S. 366.

reasonableness of general conditions, which had the effect of giving to a large and constant customer, and because he was so, advantages that a small and occasional customer could not enjoy. In another case, the question was whether a condition that a company would not be responsible for damage to fish, arising from delay in the carriage, was reasonable; *Beal v. The South Devon Company*.<sup>1</sup> In both cases the Court held such conditions to be reasonable. In *M'Manus v. The Lancashire and Yorkshire Railway Company*,<sup>2</sup> Mr. Justice Erle pointedly drew \* the distinction be- \*488  
tween the duties of carriers under special contracts and under their ordinary common-law liabilities, and the conditions which might restrict them. Where special contracts exist, those common-law liabilities altogether cease. Where conditions are imposed by the company, if they are unreasonable, they cannot be sustained; but where special contracts are made, that question of reasonableness does not arise. As to such contracts, the statute only requires that they shall be in writing, and be signed; not that their reasonableness shall be afterwards a subject for consideration. That was the distinction on which Mr. Justice Erle's judgment proceeded, and it is the true distinction.

The 4th proviso in the section has no reference to the 1st; they are wholly unconnected. It was with reference to the reasonableness of the condition alone that the case of *M'Manus* was decided. It might be right as to the reasonableness of the condition, but it was clearly erroneous as applying the question of reasonable or not reasonable to a special contract. There the condition imposed amounted to an exemption of the company from any liability, even though the damage should be caused by negligence, and the Court thought that that was unreasonable; but that does not show that a special contract to that effect might not be made. In the judgment in that case, Lord Hale's opinion<sup>3</sup> is referred to, that "a carrier may make a caution for himself"; that is, he may make conditions against the will of the public. If he now does so, by promulgating general rules, and if those conditions are acceded to, the Court may still judge of their reasonableness; but they do not constitute a special contract, which is the thing dealt with by the 4th proviso of the section. A contract is the result of the mutual \* will of two parties, which is not the case where \*489

<sup>1</sup> 5 H. & N. 875.<sup>2</sup> *Morse v. Slue*, 1 Ventr. 238.<sup>3</sup> 4 H. & N. 327, 335.



general conditions are imposed, and by an individual acceded to. [LORD BROUGHAM. — What is the difference between conditions imposed and acceded to, and a contract?] Generally speaking, there would be no difference, but this statute creates the difference. Conditions imposed and accepted were not intended to be treated as constituting a contract within the meaning of the statute; they are made the subjects of separate legislation in two distinct and unconnected provisos.

The reasonableness of the conditions may be judged of at the trial, but there is no provision for exercising such judgment where a special contract has been duly signed under the 4th proviso of the 7th section. The condition here was reasonable, *Beal v. The South Devon Railway Company*.<sup>1</sup> It no more excludes liability for negligence than did the condition in *Harrison v. The Brighton Railway Company*,<sup>2</sup> where the company was held entitled to refuse to carry dogs above the value of 5*l.*, without their value being declared, and payment made accordingly.

Then as to the 4th plea, which alleges that there was a contract in writing, duly signed. The defendants contend that that plea was proved in fact. The letter of the 1st August is truly said to constitute the contract. In that letter was a direction duly signed on behalf of the plaintiff, to forward the marbles "not insured." What is the meaning of "not insured"? It must be taken with reference to the other facts of the case, which show that the whole matter of insurance was fully understood by the plaintiff, and in writing assented to and adopted by him. The correspondence

which had previously taken place was material in this view \* 490 of the case, and \* was admissible to give a meaning to that letter. The phrase "not insured," taken with the other words of the letter, means — send the marbles at our risk, free from your liability as a common carrier, you not being the insurer. That might not relieve the defendants from liability for negligence, but it would relieve them from any thing short of negligence, *Riley v. Horne*,<sup>3</sup> where the principles regulating a carrier's liability were fully discussed. [LORD WENSLEYDALE. — Your argument is, that on this plea the defendants are exempt from all liability as insurers; but that is not the plea here.] The plea is founded upon *Wylde v. Pickford*,<sup>4</sup> where the action, as here, being founded

<sup>1</sup> 5 H. & N. 875.

<sup>3</sup> 5 Bing. 217.

<sup>2</sup> 2 Best & S. 122, 152.

<sup>4</sup> 8 M. & W. 443.

on a breach of duty *ex contractu*, the allegation in the plea of a special contract was held sufficient.

The meaning of the word "insured," if not ascertainable in any other way, may be ascertained by the course of dealing between the parties, *Hutchison v. Bowker*,<sup>1</sup> and *Gabay v. Lloyd*,<sup>2</sup> as to contracts; and *Goldshede v. Swan*,<sup>3</sup> and *Bainbridge v. Wade*,<sup>4</sup> as to guaranties. In like manner in cases of wills, particular words have been allowed to be explained by evidence, so as to show what was the intention of the testator, *Doe v. Hiscocks*; <sup>5</sup> *Macdonald v. Longbottom*.<sup>6</sup>

*Mr. Gordon Allan* replied.

The following questions were ordered to be put to the Judges:—

First. Is the condition, that the company should not be responsible for injury to the goods (that is, the marbles),  
\* unless the same were declared and insured according to \*491  
their value, a just and reasonable condition within the true  
intent and meaning of the 17 & 18 Vict. c. 31 § 7?

Secondly. Is the plaintiff entitled to have the verdict entered for him upon the 4th plea?

Thirdly. Is the plaintiff entitled to have the verdict entered for him upon the 5th plea?

April 14.

**MR. JUSTICE BLACKBURN.**—My Lords, the answers to be given to the questions put by your Lordships, in my opinion, to a great extent depend upon the true construction of the 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

That enactment affects the whole of the very extensive traffic carried on the railways and canals of the United Kingdom. Questions upon it daily arise. In general the sums in dispute are so small that the question is determined in the County Courts, not subject to appeal, further than to one of the superior Courts. But there have been already four cases originating in the superior Courts, and brought in error into the Exchequer Chamber. These

<sup>1</sup> 5 M. & W. 535.

<sup>4</sup> 16 Q. B. 89.

<sup>2</sup> 3 B. & C. 793.

<sup>5</sup> 5 M. & W. 368.

<sup>3</sup> 1 Exch. 154.

<sup>6</sup> 1 Ellis & E. 977, 987. See *Ricketts v. Turquand*, 1 H. L. Cas. 472.

four cases are *M<sup>r</sup> Manus v. Lancashire and Yorkshire Railway Company*,<sup>1</sup> decided by the Exchequer Chamber in 1859; *Peek v. North Staffordshire Railway Company*,<sup>2</sup> decided by the Exchequer Chamber in 1860, and now before your Lordships; *Harrison v. London and Brighton Railway Company*,<sup>3</sup> decided by the Exchequer Chamber in February, 1862; and *Beal v. South Devon Railway Company*,<sup>4</sup> which has been argued in the Court of Exchequer Cham-

ber, but on which no judgment has yet been delivered by \*492 that Court. \* The result of these cases has been to show that there exists a great diversity of opinion amongst the judges as to what is the effect of the enactment; so great that the law cannot be considered as settled.

This is the first time in which any questions upon the subject has come before this, the ultimate Court of Appeal; and as your Lordships' decision, so far as it shall extend, will conclusively fix the law, unless and until the Legislature again intervenes, the importance of the present case is very great, although the sum in dispute is not large.

The Railway and Canal Traffic Act, 1854, was passed in consequence of disputes between the companies and their customers, which has led to much litigation, resulting in a series of decisions fixing the law in such a manner that the Legislature thought fit to intervene.

In *Heydon's Case*,<sup>5</sup> Lord Coke says, that it was resolved, "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. 1st. What was the common law before the making of the Act? 2d. What was the mischief and defect for which the common law did not provide? 3d. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And, 4th, The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy." Independently of the high authority of Lord Coke, I think there is much reason in this; and, in conformity with the spirit of those resolutions, I shall proceed to examine what was the state of the law just before

<sup>1</sup> 4 H. & N. 327.

<sup>2</sup> Ellis, B. & E. 958, 986.

<sup>3</sup> 2 Best & S. 122, 152.

<sup>4</sup> 5 H. & N. 875.

<sup>5</sup> 3 Rep. 7b.

\* the 10th July, 1854, on which day the Railway and Canal \* 493 Traffic Act received the Royal assent.

At the common law a carrier who received goods as such was responsible for every injury occasioned to them by any means except the act of God or of the Queen's enemies. He was also bound to receive goods tendered to him for carriage, and was liable to an action if he refused to receive them without reasonable excuse; and such an action may still be maintained; *Crouch v. London and Northwestern Railway Company*.<sup>1</sup> But many years ago a practice began by which carriers sought to restrict their liability by giving notice that they would not be answerable for loss, except on conditions limiting the extent of their common-law liability as carriers. The effect of such a notice is discussed in *Gibbon v. Poynton*, decided in 1769.<sup>2</sup> It is apparent from that case that the practice was not then new, though I cannot find when it first arose. After 1769, and before 23d July, 1830, when the first Carriers' Act (11 Geo. 4, & 1 Wm. 4, c. 68) received the Royal assent, the cases on carriers' notices are very numerous.

Mr. Justice Story, in his Commentaries on the Law of Bailments<sup>3</sup> (published in 1832, after the Carriers' Act, but in America, where that Act had no effect), states, as I think accurately, what was the effect of the decisions up to the time. "It was," says he, "formerly a question of much doubt how far common carriers on land could by contract limit their responsibility, upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and have no right to change their common-law rights and duties. And it was said that, like innkeepers, they are bound to receive and accommodate all persons, as far as they \* may, and could not insist upon special and \* 494 qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's Case*,<sup>4</sup> and it was admitted in *Morse v. Slue*. It is now fully recognised and settled beyond any reasonable doubt." So far the passage is cited and adopted in the judgment of the Court of Common Pleas in *Austin v. Manchester, &c. Railway Company*,<sup>5</sup> a case decided in 1850, to which I shall hereafter have to call atten-

<sup>1</sup> 14 C. B. 255.

<sup>2</sup> 4 Burr. 2299.

<sup>3</sup> Section 549.

<sup>4</sup> 4 Rep. 84.

<sup>5</sup> 10 C. B. 473.

tion ; and so far I think this, according to the decisions subsequent to 1832, still remained law in 1854, when the Railway and Canal Traffic Act was passed. But Mr. Justice Story proceeds to say : " Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice exempt themselves from all responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct."

In my opinion, the weight of authority was in 1832 in favour of this view of the law, but the cases decided in our Courts between 1832 and 1854 established that this was not law, and that a carrier might by a special notice make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants ; and, as it seems to me, the reason why the Legislature intervened in the Rail-  
 \*495 way \* and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), " to evade altogether the salutary policy of the common law." Such is my opinion ; but to maintain it I must examine the cases in more detail.

Before doing so, however, I must observe that Story's expressions are, that the carriers might by " contract " or by " special agreement " limit their liability, — expressions showing, I think, that his idea was that conditions in a notice operated by way of agreement or contract.

Mr. Justice Erle, in his judgment, dissenting from that of the majority of the Judges of the Exchequer Chamber, in *M. Manus v. The Lancashire and Yorkshire Railway Company*, contends at some length that this is a mistake, and that conditions operated as restrictions on the public profession of the carrier, and not as parts of a contract. Before the Carriers' Act (11 Geo. 4, and 1 Wm. 4 c. 68) this might have been plausibly contended, but if it had been so, as it seems to me, it would have followed that it was not necessary to show that the notice was brought home to the individual customer ; for if the carrier was exempted from the common-law

liability on the ground that his public profession was only to be a carrier, subject to conditions imposing a restricted liability, no one could have a right to charge him as a carrier with general liability, unless it could be shown that the carrier had so acted towards the individual suing him as to induce that individual to employ him on the supposition that he was a carrier professing unlimited liability. Under such circumstances, the carrier would be precluded, as against that particular individual, from setting up the conditions. In no other way, as far as I can see, could he be charged on this supposition, merely because the customer was not informed of the restriction. But in *\*Kerr v. Willan*, decided in 1817,<sup>1</sup> and I think in all the subsequent cases, it was held that the notice, to be effectual, must be brought home to the particular customer, which, in my opinion, shows that the condition operated entirely by way of contract, and not by way of restriction on the public profession. So completely was the necessity of bringing the notice home to the particular party established, that Mr. Smith, in the first edition of his *Leading Cases* (which was published in 1837), says, "If this notice was not communicated to the employer, it was, of course, ineffectual." And this expression of the self-evident nature of the proposition has been allowed to stand in all the editions of his work, without remark or qualification by any of his very learned editors. Mr. Smith proceeds to add, "But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by the contents." That very learned gentleman evidently considered that at the time when he wrote (1837) it had become settled that the notice operated as a special contract with those to whom it was brought home, and not as a public condition limiting the profession of the carrier.

However much this might have been open to question before the first Carriers' Act (11 Geo. 4, and 1 Wm. 4, c. 68), it seems to me, with all deference to those who hold the opposite opinion, to be incontrovertible after that Act. By that Act, after giving, by the first three sections, effect to public notices restricting the liability of carriers as to certain articles, it is by the 4th section provided that from and after the 1st of September, 1830, "no public notice or declaration heretofore made, or hereafter

\* to be made, shall be deemed or construed to limit or in \*497

<sup>1</sup> 6 M. & S. 150.

any wise affect, the liability at common law" of any carrier; but every such carrier shall, except as to goods brought within that Act, be liable as at the common law, "any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability notwithstanding." By section 6 it is provided that nothing in that Act should "affect any special contract between such carrier," and any other parties for the conveyance of goods and merchandise. It certainly seems to me that, whatever might have been the case before this enactment, it is clearly enacted that no condition shall in future operate merely as being a public condition or public declaration, and that, to be effectual at all, it must be incorporated in a special contract.

In *Wyld v. Pickford*,<sup>1</sup> decided in 1841, the question before the Court arose on demurrer. The first count was against the defendants, for a breach of duty as carriers, in not taking proper care of maps, which they had received to be carried. The second count was in trover. To the first count was a plea that, "at the time of the delivery to the defendants of the maps, they gave notice to the plaintiffs, and plaintiffs had notice that the defendants would not be responsible for loss or damage done" (*inter alia*) "to maps, unless insured and paid for at the time of the delivery to the defendants; and that defendants accepted the maps under the terms and conditions of the notice, and no others, as the plaintiffs at the time knew; and that they were not paid for or insured." There was a similar plea to the count in trover, averring that the

\* 498 conversion was a loss by a misdelivery \* through mistake and inadvertence. To these pleas was a demurrer.

The judgment was delivered by Baron Parke, after some time had been taken to consider; and it has, I believe, always been considered as one of great authority. The Court, after first stating the argument of counsel, that fraud was not alleged at all, and that a special contract was at all events not sufficiently alleged, said: "We agree that if the notice furnishes a defence, it must be either on the ground of fraud, or of a limitation of liability by contract, which limitation it is competent for a carrier to make, because being entitled by common law to insist on the full price being paid beforehand, he may, if such price be not paid, refuse to carry them upon the terms imposed by the common law, and insist upon his own, and if the proprietor of the goods still chooses that

<sup>1</sup> 8 M. & W. 443.

they should be carried, it must be on those terms. And probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable, as upon the custom of England, for the remainder. It seems to us, however, that in the present case there is a sufficient allegation of such a special contract." The judgment then proceeds to support the plea to the first count.

This seems to me to show very strongly that (independently of Statute 11 Geo. 4, and 1 Wm. 4, c. 68, which was not referred to in *Wyld v. Pickford*) a condition or declaration was considered to operate only as being incorporated in a special contract. The judgment, however, was, that the plea to the count in trover was bad. This was on the ground that, on the weight of authority, a notice in the terms stated in the plea, viz. that the carriers "would not be responsible for loss or damage done to goods," unless insured, did not make \* the carrier irre- \*499 sponsible for every loss, but only for such as occurred without negligence, whether gross or ordinary, and the inadvertent misdelivery admitted on the plea might be even grossly negligent, though inadvertent. This was in conformity with the latter part of the section from Story on Bailments, which I have already cited [*ante*, p. 493]; but it differs from him in this, that Story seems to me to consider that a condition so expressed as to manifest an intention to exempt the carrier from liability for gross negligence, was void in law, whilst the judgment in *Wyld v. Pickford* seems to me to proceed on the ground that the authorities bound the Court to put a construction on the terms of the notice, that the carrier "would not be responsible for loss or damage," making them mean, would not be responsible for loss or damage unless caused by negligence. This certainly seems to me not the natural meaning of the words, or the sense in which they would be understood, either by a carrier or his customer; and though the weight of authority might, at the time when *Wyld v. Pickford* was decided, compel one of the Courts below to put this forced meaning on the words, I think your Lordships would hardly even then have considered yourselves bound to do so.

But in the subsequent case of *Hinton v. Dibbin*,<sup>1</sup> in 1842, this matter had to be considered. There the action was against a carrier for the negligent loss of silk above the value of 10*l*. The plea set up the Carriers' Act, by which the carriers are "not to be

<sup>1</sup> 2 Q. B. 646.



liable for the loss of or injury to" (*inter alia*) silk, unless the value be declared and insured.

The replication was, that the loss was occasioned by gross negligence of the carrier. The words in the Carriers' \* 500 \* Act are the same as those in the plea in *Wyld v. Pickford*.

On the demurrer in *Hinton v. Dibbin*, the question raised was whether those words were to be construed as containing an implied exception of gross negligence. The decision of the Court was that the words were, in the Carriers' Act, to be understood in their natural sense, as exempting the carriers from liability arising from negligence as well as from accident.

This decision has always been acquiesced in. I am not aware of any case in which a Court has subsequently put a construction upon those words when used in a notice; but it certainly seems to me very undesirable that a different effect should be given to such words, when used by a carrier, from that which is given to them if used by the Legislature, or by an ordinary person.

It was about the time of the decision of *Hinton v. Dibbin* that railways came into general use, and began to supersede all other modes of conveyance. The companies became in the habit of imposing conditions on their customers intended to restrict, and in some cases entirely to remove their liability to an extent many persons thought unreasonable. The validity of such restrictions was questioned in various actions, and the series of decisions arose which resulted in settling the law in such a manner as to cause the Legislature to intervene by the Railway and Canal Traffic Act, 1854.

The first case was that of *Shaw v. York and North Midland Railway Company*,<sup>1</sup> decided in 1849. There the declaration was against the defendants as carriers of horses. There was a plea of not guilty, and a traverse of the allegation that the horses were received to be safely and securely carried. It appeared \* 501 upon the trial that when \* the horses were received by the defendants, a ticket was given to the plaintiff, containing this memorandum: "N. B. This ticket is issued subject to the owners undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to horses or carriages while travelling, or in loading or unloading." It appeared that the injury to the horse

<sup>1</sup> 13 Q. B. 347.

in that case, which caused its death, was occasioned by a defect in one of the horse-boxes in which plaintiff's horses were placed, and which defect was pointed out to the defendants' servants, who tried, but unsuccessfully, to cure it. Baron Alderson, before whom the cause was tried, was of opinion that the special notice did not exempt the defendants from the obligation to use ordinary care; and also, on the authority of *Lyon v. Mells*,<sup>1</sup> that a contract in the terms of the memorandum was subject to an implied exception of injury arising from the insufficiency of the carriage provided by the defendants; and he directed a verdict for the plaintiff. The Court of Queen's Bench, however, granted a new trial, on the ground of misdirection; Lord Denman, in delivering the judgment, saying, "It appears to us to be clear that the terms contained in the ticket given to the plaintiff at the time the horses were received, formed part of the contract for the carriage of the horses between the plaintiff and defendants, and that the allegation in the declaration that the defendants received the horses to be safely and securely carried by them, which would throw the risks of conveyance upon the defendants, is disproved by the memorandum at the foot of the ticket; and the alleged duty of the defendants safely and securely to convey and carry the horses, would not arise \* upon such a contract. It may be \* 502 that, notwithstanding the terms of the contract, the plaintiff might have alleged that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared; but has alleged a duty which does not arise upon the contract as it appeared in evidence."

The next case was that of *Austin v. Manchester, Sheffield, and Lincolnshire Railway Company*,<sup>2</sup> in 1851. The declaration stated that the defendants "received the plaintiff's horses to be carried for reward," from New Holland to Shoreditch; and then alleged a case of gross negligence against the defendants' servants. There was a plea traversing the allegation, that the horses were received as alleged. On the trial it appears that the horses were received under a ticket signed by the plaintiff, by which the proprietor of the horses took upon himself all risks of conveyance. The Court of Queen's Bench held that the plea was proved, and was good. This case, like the former, was decided on the form of the declara-

<sup>1</sup> 5 East, 428.

<sup>2</sup> 16 Q. B. 600.

tion, but it went far to show that in the opinion of the Court of Queen's Bench, no good declaration could have been proved. The same plaintiff brought another action subsequently in the Court of Common Pleas, which I shall notice presently.

The next case in order of date was *Chippendale v. Lancashire and Yorkshire Railway Company*,<sup>1</sup> decided in November, 1851. That was an appeal from the County Court, which, as the law then was, was heard before two Judges only, Justice Coleridge and

Justice Erle. In that case it was held, in spite of an able  
\* 503 argument by the \* late Mr. Cowling, that the condition in the Lancashire and Yorkshire ticket protected them from being liable for any injury, even if caused by a defect in the carriages. This being a case in the County Court, was decided without reference to any forms of pleadings.

The next case was that of *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*,<sup>2</sup> decided in 1852. There the declaration (stating that there was a ticket and its effect), averred gross and culpable negligence in the defendants' servants. These averments were proved at the trial; but the Court of Common Pleas arrested the judgment. The elaborate judgment delivered by Mr. Justice Cresswell, puts it on the ground that the question depended upon the nature of the contract entered into between the parties in the case, and that the contract contained in the ticket in that case, which exempted the defendants from responsibility for damage, however caused, did protect them from responsibility for the loss in that case, arising from the neglect of the defendants' servants on the journey, "whether," says the judgment, "it was called negligence merely, or gross negligence, or culpable negligence, or whatever epithet might be applied to it, it was within the exemption."

The next case was that of *Carr v. Lancashire and Yorkshire Railway Company*,<sup>3</sup> decided in May, 1852. There the declaration stated that the defendants had received a horse to be carried for hire in a horse-box on their railway, subject to the conditions in a notice at the foot of a ticket for the conveyance of the horse, in these words: "This ticket is issued, subject to the owners undertaking all risks of conveyance whatsoever, as the  
\* 504 \* company will not be responsible for any injury or damage

<sup>1</sup> 21 Law J. N. S. Q. B. 22.

<sup>2</sup> 7 Exch. 707.

<sup>3</sup> 10 C. B. 454.

(howsoever caused), occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The declaration then proceeded to allege that whilst the horse was in the custody of the defendants, and through the improper conduct and gross negligence, and from want of proper care on the part of the defendants, the horse-box was propelled on the railway against certain trucks, and the horse thereby killed. The jury found as a fact that the accident was occasioned by the gross negligence of the defendants, and this finding was not complained of. Nevertheless, the judgment was arrested.

This was certainly a very strong case. The gross negligence of the defendants occasioning a collision by which a horse was killed would have afforded a cause of action to the owner of that horse, if he had been a stranger whose horse was casually there, or even if he had been, as in *Davies v. Mann*,<sup>1</sup> a wrongdoer, unless by reasonable skill and diligence on his part he could have avoided the consequence of the gross negligence of the defendants. Yet the Court of Exchequer held, and I think rightly held, that this was a special contract by which the plaintiff had taken upon himself all risk, and agreed that the company should not be responsible for any injury or damage, however caused; and Baron Parke concluded his judgment by saying, "It is not for us to fritter away the true sense and meaning of these contracts, merely with a view to make men careful. If any inconvenience should arise from their being entered into, that is not a matter for our interference, but it must be left to the Legislature, who may, if they please, put a \* stop to this mode which the carriers have \* 505 adopted of limiting their liability. We are bound to construe the words used, according to their proper meaning, and according to the true meaning and intention of the parties as here expressed. I am of opinion that the defendants are not liable." In every word of this I thoroughly concur. I think that such was the law at the time this judgment was given; and I think that the Court was bound to act upon it. But when we come to construe an Act of Parliament passed soon after this decision, with a view to alter the law, and inquire, in the spirit of the resolutions in *Heydon's Case*, what was the mischief and defect for which the law did not provide, and what remedy the Parliament hath resolved and appointed to cure the disease of the law, it seems to me im-

<sup>1</sup> 10 M. & W. 546.

possible to avoid coming to the conclusion that this judgment was in the contemplation of the Legislature.

One more case occurred before the passing of the Railway and Canal Traffic Act, 1854, to which it is necessary to call attention. In *Walker v. York and North Midland Railway Company*,<sup>1</sup> decided in 1853, the defendants had caused notices to be personally served on a number of fishermen at Scarborough. By these notices, the defendants declared that they would not carry fish, except subject to certain conditions limiting their responsibility, and stated that the station clerks and servants of the company had no power to alter these conditions. The fishermen objected much; there was somewhat of a riot; and the notices were torn up. After this the plaintiff sent fish by the railway. There was a controversy at the trial as to whether he was one of the persons served with the notice or not. The Judge told the jurors that if they \* 506 \* thought the plaintiff was one of those served with the notice they might infer from that fact a special contract according to its terms; and he advised them to draw that inference from the receipt of the notice, and the subsequent sending of the goods, unless in the interim the plaintiff had unambiguously refused to deliver the goods on the terms of the notice, and the defendants had acquiesced in that refusal. The jury having found that there was a special contract, the Court of Queen's Bench held that the direction had been right, and the verdict was not disturbed. In this case also, I think that the Court was right; but there is no doubt that many persons thought it hard that a special contract to abide by a notice should be inferred from the acts of a man who supposed himself to be protesting against it; and this case also was, as I conceive, in the contemplation of the Legislature, when passing the Railway and Canal Traffic Act, 1854.

*The Great Northern Railway v. Morville*; <sup>2</sup> *The York, Newcastle, and Berwick Railway v. Crisp*; <sup>3</sup> *Hughes v. Great Western Company*; <sup>4</sup> and *Slim v. Great Northern Railway Company*,<sup>5</sup> are cases decided in the course of 1852, 1853, and 1854, in which the Courts acted upon the decisions of *Austin v. Manchester and Sheffield Railway Company*, and *Carr v. Lancashire and Yorkshire Railway Company*. It is not necessary to enter into the particu-

<sup>1</sup> 2 Ellis & B. 750.

<sup>4</sup> 14 C. B. 637.

<sup>2</sup> 21 Law J. N. S. Q. B. 319.

<sup>5</sup> 14 C. B. 647.

<sup>3</sup> 14 C. B. 527.

lars of these cases, further than to say that their number leaves no doubt that there was dissatisfaction on the part of many persons with the existing state of the law.

Now if this be a correct statement of the authorities before 1854 (and I am not aware that I have omitted \*any \*507 thing), we find that by the express enactment of the Legislature in 11 Geo. 4, and 1 Wm. 4, c. 68, no public notice or declaration could as such in any ways affect the liability of a carrier as regarded goods in general, though special contracts might be made as at common law; and it had been decided that such notices or declarations, when brought home to the customer, did operate as being the basis of a special contract to carry on the conditions contained in such notices. It had also been decided that such conditions, when thus made part of a special contract, were binding, even when protecting the company from responsibility for all loss or injury, however caused. It had further been decided that a special contract ought to be inferred from the act of a party sending goods after a receipt of a notice, even where the party protested against the notice. And this state of the law, it was alleged by many persons, was taken advantage of by the railway companies, who had a practical monopoly of the carriage of goods, and, it was alleged, abused their advantages so as (in the language of Story, already cited) "to evade altogether the salutary policy of the common law."

It was under these circumstances that the Railway and Canal Traffic Act, 1854, was passed. The 7th section is in these terms. [See *ante*, p. 474.]

The language of this section has been very severely criticised, and I do not attempt to defend it; for the section is very inartificially framed; and the difference of opinion that has existed as to its construction shows that, when looked at by itself, it is obscure. But I think that when the previous state of the decisions is looked to, and the language of the statute is construed, as it ought to be, with reference to them, the intention of the Legislature is clear.

\* In *Pardington v. South Wales Railway Company*,<sup>1</sup> Baron \*508 Bramwell threw out an opinion that a condition incorporated in a signed contract was not within the enactment at the beginning of the 7th section. And the same opinion has been twice

<sup>1</sup> 1 H. & N. 392.

strenuously maintained by Chief Justice Erle, and I believe is entertained by others. But I think, when it is borne in mind that the decisions which were complained of, and which gave rise to the legislation, were all of them on the effect of conditions contained in special contracts, and all, except *Walker v. North Midland Railway Company*, on the effect of conditions contained in signed contracts, it is impossible to suppose that the Legislature did not intend to provide for such cases — I think that those who put such a construction on the Act can hardly be said, in the language of Lord Coke, in *Heydon's Case*, to “make such construction as shall suppress the mischief and advance the remedy.” And if we look to the words used, it seems to me, inasmuch as conditions (as I think) could not operate unless contained in a special contract, and at all events, in practice, were only made operative as the basis of a special contract, that the language of the Act by which a proviso expressed to relate to a special contract is engrafted on an enactment in terms referring only to conditions, though doubtless inartificial and ill expressed, is by no means insensible. In truth it seems that the intention of the Legislature was to correct the practical mischief supposed to arise from the decision in *Carr v. Lancashire and Yorkshire Railway Company*, that any conditions made in a contract with a Railway Company were binding because contained in a contract; but to provide that conditions, if

\* 509 adjudged to be reasonable, \* might still be made as heretofore; and also, having reference to the decision in *Walker v. York and North Midland Railway Company*, to provide that the contract by which the condition is made binding must be express, and signed, and not constructive.

The true construction of the Act is, I think, that which is very clearly expressed by Lord Chief Justice Jervis, in delivering the judgment of the Common Pleas in *Simons v. The Great Western Railway Co.*,<sup>1</sup> and *The London and Northwestern Railway Co. v. Dunham*,<sup>2</sup> where he says, “The fair meaning of the section, as it seems to me, is this: the first branch of it declares that all notices, conditions, or declarations made and given by the company shall be null and void, in so far as they go to release the company from liability for loss of or injury to goods, &c., in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants. But then it goes on to

<sup>1</sup> 18 C. B. 805, 829.

<sup>2</sup> 18 C. B. 826, 829.

provide in the next branch that this shall not prevent the company from making such conditions, which shall be adjudged by the Court or Judge before which any question relating thereto shall be tried, to be just and reasonable. And further, though just and reasonable, such condition or special contract shall not be binding unless signed by the person sending or delivering the goods.

This judgment was adopted by the majority of the Queen's Bench, in *Peek v. North Staffordshire Railway Company*, and by the majority of the Exchequer Chamber in *M'Manus v. Lancashire and Yorkshire Railway Company*. The Judges who concurred in these decisions were Lord Campbell, Lord Chief Justice Jervis, Mr. Justice Cresswell, Mr. Justice Williams, Mr. Justice Crompton, Mr. Justice Crowder, and Mr. Justice Willes;

\* certainly forming a very great weight of authority, but \*510 undoubtedly there is great authority on the other side; and your Lordships will probably rather be influenced by what you consider the value of the reasons on which the judgments are founded than on the names of those who joined in them.

I shall now proceed to answer your Lordships' questions, assuming that I have established that a condition exempting a railway company from liability for loss or injury done to goods occasioned by the neglect or default of the company or its servants is void, unless it be such as the Court, as a matter of law, adjudges to be reasonable, and unless also it is contained in a signed contract.

I answer your Lordships' first question in the negative. I think the condition is not a just and reasonable condition within the meaning of the Act.

If the effect of the condition was merely to stipulate that the carriers should not be responsible for any loss or injury accruing to the articles from accident (other than the act of God or the Queen's enemies), leaving them liable for all loss or injury which could be shown to arise from their neglect or default, the condition would, I think, be reasonable, or rather it would not be within the enactment which renders void only those conditions which limit the liability of the company for loss or injury occasioned by neglect or default on their part. But I do not think that this is the meaning of the condition. A condition to that effect would afford the company some protection, but not much. It would oblige the plaintiff to give some evidence of negligence or default; but such evidence can generally be given, and when



it was given, it would be a question for the jury. Now, the object of the companies is to withdraw the question from the jury.

They say (I fear with some truth) that the bias of a  
 \* 511 \* jury is so decidedly against them, that, especially in the County Courts, they do not get impartial justice. And the Legislature has been so far impressed by this, that it is provided that the reasonableness of the condition shall be adjudged by the Court. I think that those who framed the condition in the present case intended to stipulate that the company should not be liable for any loss or injury accruing in the course of the carriage, so that there might be no question for the jury at all. And with this view they have chosen the very words used by the Legislature in the first Carriers' Act (11 Geo. 4, and 1 Wm. 4, c. 68.) Those very words were determined in *Hinton v. Dibbin*,<sup>1</sup> to exempt the carrier from liability for loss or injury occasioned by gross negligence of the carriers' servants. That decision was come to in 1842, now twenty years ago. It has, I believe, been uniformly acted on ever since; and I think that when we find carriers using those very words in a notice, we should construe them as intended to have that effect; and, independently of this, I think such must have been the object of their using the words, and the words are such as must, I think, have been understood in that sense by any ordinary person unacquainted with the decisions.

Assuming that the condition has this meaning, is it reasonable? I think that a condition exempting the carriers wholly from liability for the neglect and default of their servants is *prima facie* unreasonable. I do not go so far as to say that it is necessarily in every case unreasonable and void. A carrier is bound to carry for a reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms

\* 512 that he shall have no liability at all, and holds \* forth as an inducement a reduction of the price below that which would be reasonable remuneration for carrying at carriers' risk, or some additional advantage, which he is not bound to give, and does not give, to those that employ him with a common-law liability, I think a condition thus offered may be reasonable enough. For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the con-

<sup>1</sup> 2 Q. B. 646.

tract, or on the terms of his undertaking the common-law liability, are necessarily reasonable as regards the person having that option. Accordingly, in *Simons v. Great Western Railway Company*,<sup>1</sup> where the Great Western Railway Company gave notice that they carried goods in general on certain terms, and also that they would carry goods at special or mileage rates, it was held, on this principle, that the 15th condition, which stipulated (*inter alia*), that the company would not be responsible for damage to goods carried at special or mileage rate, however caused, was valid. But then, as it seems to me, to bring a case within this principle it must appear that the customer really had an alternative; that he had power, if he pleased, to have set his goods at the ordinary rates and on the ordinary terms as to liability, and having that option elected to send them otherwise. But in the present case there is no such option; the defendants refused to carry the goods at all unless the customer either consents that they should be carried without liability for neglect or default, or agrees to pay whatever amount they choose to fix as an insurance. I do not deny that the carrier's risk is greater where the article is fragile and valuable than in other cases, and therefore the carrier's remuneration may be \*increased where the article is of such \* 513 a nature. But I think that the onus lies strongly on the carriers to show that the extra sum they demand is no more than is necessary to raise the ordinary charge to that which is reasonable with regard to the particular article. In the present case the charge which the company sought to impose was 10% per cent. on the value, or 21%. No attempt was made at the trial to show that this was reasonable; probably because this high charge was intended to be a deterring rate, and it was felt by the company's advisers useless to attempt to show the contrary. But at all events no evidence was given to show that the charge was reasonable, and I think the onus of proving that it was lay on the company. I cannot, therefore, look upon this as a case in which the defendants offer the customer a *bona fide* practical choice, either to have his goods carried in the ordinary way for a reasonable remuneration, or at his own risk at a lower rate, but as an instance of what is called by Story in the passage cited by me [*ante*, p. 493], attempting, by demanding an exorbitant fine, to compel the owner of the goods to yield to unjust and oppressive limi-

<sup>1</sup> 18 C. B. 805, 813.

tations on his rights, and I consequently come to the conclusion that the condition is unreasonable. This was the view taken by the Court of Queen's Bench, in *Harrison v. London and Brighton Railway Company*.<sup>1</sup> The majority of the Court of Exchequer Chamber reversed that decision, and of course in a lower Court I should be bound by that authority. But here, in your Lordships' House, I am not so bound; and after carefully considering the judgment of the majority delivered by Chief Justice Erle, and the judgment of my brother Wilde, who agreed with

\* 514 \* the Queen's Bench, I have not been able to acquiesce in the opinion of the majority. I forbear, however, to enter into the arguments there used, as they are in print, and your Lordships can refer to them. I would only observe, that in my view of the matter it is quite immaterial in this, as it was, I think, in that case, whether the injury arose from the neglect of the company or not. The condition, as I think, was either void or valid *ab initio*, and before the injury accrued. If it was valid, it protected the defendants, even though the injury was occasioned by their neglect; if it was void, there was nothing to relieve the defendants from their common-law liability as carriers.

The next question asked by your Lordships is, whether the plaintiff is entitled to have the verdict entered for him on the fourth plea. Your Lordships do not ask whether that plea is good. I have already indicated in what I have written, that in my opinion the plea ought to have gone on to show that the special contract was not only made, but was reasonable. In my view of the matter, however, this is of no consequence, as I think the plea, as pleaded, is not proved.

The substance of that plea is, that there was a special contract signed by George Whittingham for Meigh, who was the person delivering the goods to the defendants, whereby it was agreed that the defendants should not be responsible for the loss or injury to marbles, unless declared and insured according to their value. That the goods were marbles, and that they were not declared or insured by the plaintiffs. In my opinion there is ample evidence of the averments that the goods were marbles, and that the value was not declared, and that they were not insured in any sense;

and there is evidence, from which the jury might, and as I \* 515 think ought to have \* found, that there was an agreement

<sup>1</sup> 2 Best & S. 122.

or special contract between the plaintiff, through his agent, Meigh, and the defendants, that the defendants should not be responsible for loss or injury to these marbles, but I think that there is no evidence that this contract was in writing, or signed by any one.

The following seem to me the material parts of the evidence. First, there is a public notice by the defendants, that they will receive, forward, and deliver goods solely subject to the conditions thereunder stated ; one of those conditions being, "That the company shall not be responsible for the loss of or injury to any marbles," &c., "unless declared and insured according to their value." There is evidence that Meigh & Co., who were the agents of the plaintiff, and who, for this purpose, must be considered as identified with the plaintiff, had notice of this condition, and were told partly by word of mouth and partly by letters, that the company would not accept the marbles in question to be carried on any other terms, unless the plaintiff would pay ten per cent. on their value. And then comes the letter of the 1st August, 1857, on which the question turns. It is in these terms [see *ante*, 478]. There is ample evidence that the signature of Meigh was affixed to this letter by a person having authority to sign it for him, and there is ample evidence that Meigh was the person delivering the goods to the defendants. The only question therefore left is whether the signing of this letter was the signing of a contract to the effect that the defendants should not be responsible for loss or injury to the marbles.

The letter is an instrument in writing, and its construction is for the Court as a question of law. I take the law on this subject to be accurately stated in *Neilson v. Horford*,<sup>1</sup> \*516 where Baron Parke says, "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury ; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained ; or conditionally, when these words or circumstances are necessarily referred to them."

<sup>1</sup> 8 M. & W. 823.

This is, I believe, universally admitted to be an accurate statement of the law, though difficulty is at times felt in applying it. But the true meaning of the written instrument, when ascertained, is only one step towards determining the question whether it constitutes a contract. If the parties to an agreement have reduced it to writing, that writing, at law, determines what is the contract, and evidence cannot be received to contradict, add to, subtract from, or vary the terms of the writing. Even if it be the fact that the contract has been by mistake written down in terms quite different from those the parties had really agreed on, the remedy is to be sought by a suit in equity to reform the contract, not by giving evidence to alter it. The principle on which this rule is founded is, that the parties having put the contract in writing, have made that writing the record of the contract. By doing so they have superseded all previous negotiations, and may not depart from the terms in writing. But then there is always

\*517 a preliminary \*question in each case ; viz. whether the particular writing is in that case the written record of the contract, by which the parties are bound, or whether it is merely one of the facts given in evidence, by which the agreement between the parties is to be proved.

If the writing is the contract, the Judge is bound to exclude all evidence to show that the real intention of the parties to the agreement was different from that which appears on the writing, or, if such evidence has been received before it appeared that the contract was reduced to writing, he is bound to direct the jury to disregard it. This is the rule as to all evidence to show what the parties intended to express in the writing, though evidence may be received to apply the writing and enable the Court to understand what is the intention expressed by it.

This, I think, is the principle laid down by Sir James Wigram in his celebrated treatise on Extrinsic Evidence,<sup>1</sup> when he says that the distinction “between evidence which is ancillary only to a right understanding of the words to which it is applied, and which is, therefore, simply explanatory of the words themselves, — and evidence which is applied to prove intention itself as an independent fact, is broad and palpable” ; and he adds that “this distinction is essential to a right understanding of the subject.”

I apprehend that the question whether there is a contract in

<sup>1</sup> Section 10, page 9.

writing depends upon the question whether the circumstances are such as to show that the agreement was put into writing so as to supersede all previous negotiations, and exclude all evidence of intention as an independent fact. And this, as I have already said, is a preliminary question to be decided by the Judge, not as a \*matter in his discretion, but as a mixed question of \*518 law and fact; and his decision upon such a point is open to review on such a rule as the present. And I propose now to examine the evidence in the case with a view to see whether it ought to have been decided that this contract was put in writing.

In deciding it, the nature of the writing alleged to be the agreement is always important, though not conclusive. Now, looking at the letter of 1st August, 1857, I find in it nothing requiring any parol evidence to explain the meaning of the words. It is a plain direction to send the marbles "not insured." That means, in ordinary language, without paying any insurance money, or entering into any contract of insurance respecting them. Your Lordships have to say whether the parties intended to make this letter the record of their contract, so as to abrogate all previous negotiation on the subject, and confine their rights and liabilities to those which, as a matter of law, would arise from a delivery and receipt of the goods on those terms. To me it seems that they did not. I think that this letter is conclusive evidence of the fact that Meigh refused to pay any insurance, which is a very material fact to go to the jury in determining what the contract was; but that the other facts in the case are to be taken along with it, not as what Sir James Wigram calls explanatory evidence, to enable the Court to understand what is the meaning of the words in a written contract contained in the letter of 1st August, but as evidence to prove intention as an independent fact; which is admissible, because the letter of 1st August is not the written contract, and which evidence would not be admissible if it were the written contract.

The parol evidence shows that notice was given to the plaintiff that unless the marbles were insured the defendants \*would not accept them except on the terms that they would \*519 not be responsible for the loss or injury to them. And, according to *Wyld v. Pickford*<sup>1</sup> and *Walker v. York and North Midland Railway Company*,<sup>2</sup> I think that a jury would be justified in

<sup>1</sup> 8 M. & W. 443.<sup>2</sup> 2 Ellis & B. 750.

finding, or perhaps I should say bound to find, that when with that notice he sent the goods he made a special contract that the company should not be responsible for loss or injury. But the parol evidence might have been different, and such as to show that notice was given to him that this company would not accept them, except on the terms of the Lancashire and Yorkshire Company, which are expressed so as more distinctly to limit the responsibility of the company, namely, not to be responsible for loss or injury, however caused ; or on terms expressed so as not to limit the responsibility of the company so much, such as those of the South Devon Company, which stipulates that it will not be responsible for loss or injury unless caused by gross negligence or fraud on the part of the company or its servants. And, if the parol evidence had shown that the notice given by the defendants was in the terms of the notices of either of those companies, I think that the agreement which the jury would have been bound to find would be the agreement to carry, with the responsibility more or less extensive, which the parol evidence would have shown was that really intended. This was pointed out by my brother Crompton in his judgment below, but the force and effect of his argument did not appear to be appreciated by the counsel who argued at your Lordships' bar. To my mind it is conclusive to show that the parol evidence of what was brought to the notice of the plaintiff is evidence of the class which Sir J. Wigram calls "evidence to prove intention it-

\* 520 self as an independent fact," \* which cannot therefore be admitted if the letter of 1st August was a contract.

In the judgment of the majority of the Exchequer Chamber, delivered by my brother Martin, it is argued that the letter is a contract between a customer and a carrier, and that the parties are therefore to be supposed to have the Carriers' Act in contemplation, and to use the word "insured" in the sense in which it is used in section 3 of that Act. But I think that this letter was expressed not with reference to the Carriers' Act, but to the previous negotiations. I base my opinion upon the conclusion which, as a mixed question of law or fact, I draw from the whole of the evidence that the letter was not written or sent, as being a reduction of the contract into writing, so as to exclude the evidence of the previous negotiations. It chanced in this case that the intention of the parties, proved by these negotiations and the letter together, was to make an agreement to carry, not being responsi-

ble for loss or injury to the marbles; but it might have happened that a letter in the same terms was written, and yet that the intention of the parties, as shown by the negotiations, was to make an agreement to carry with a responsibility not so limited as this, though still with a responsibility less than that of carriers at common law; and if it had been so proved, I think that would have been the agreement.

I therefore think that there was not a special contract signed, as I think that the letter which was signed was not a contract, and that therefore the plaintiff is entitled to the verdict on this plea.

In answer to the last question, I think the plaintiff is entitled to have the verdict entered on the 5th plea. I have already, at some length, given my reasons for thinking that the condition was not just or reasonable, \* and that even if it had been \* 521 reasonable the plaintiff did not assent to it within the meaning of the plea. He did, it is true, assent to it in one sense, but I think that after verdict the allegation in the plea would be understood to mean that he assented to it so as to bind himself; and as I have already argued at some length, he did not bindingly assent to it, inasmuch as there was no contract signed on his behalf.

MR. JUSTICE WILLES. — My Lords, I am of opinion that the condition mentioned in the first question is just and reasonable, upon the ground that a person who is asked to incur a risk at the request and for the benefit of another, may reasonably wish to be remunerated or excused. It is fallacious to suppose that because, in the absence of special stipulation, the risk, apart from that misconduct, falls upon the carrier, therefore that it cannot properly be made the subject of a distinct charge. There is no proof that the charge made was unreasonable. There is no such point before us. If it had been raised, it would have presented a question in its nature fit for a jury, not for the Court.

As to the second question, it is fully discussed in the judgment of the Exchequer Chamber, in which I concurred. I venture to add, that ordinary experience informs one versed in the subject, that the term "not insured," means, as between carrier and customer, that the goods are at the risk of the customer, because of the customer preferring to take that risk upon himself rather than pay the price of the carrier taking it upon him. I find it as impossible to divest myself of that knowledge, and to say that "not



insured" means nothing, as it would be to forget the meaning of "colour" or "journeys accounts." This point is not

\* 522 touched by the case of *M'Manus v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> where the condition was different. If there was no condition, I think the plea was proved by the letter; but there being such a condition, I think that it is one of the surrounding circumstances by which the letter may be construed. In the former case the general contract is negatived, in the latter the 4th plea is proved in terms.

The third question was not argued in the Exchequer Chamber. It may be stated thus, viz. whether the words "special contract" in the 4th proviso of the 7th section of "The Railway and Canal Traffic Act, 1854," mean contract "special" only because of its creating a relation different from that between a common carrier and his employer, so as to include all cases of notice or condition or declaration, stating the terms upon which the business of the company is conducted, or a contract "special" in a more limited sense, viz. as being different from the terms upon which the company generally carries on business, whether, according to the law applicable to common carriers *simpliciter*, or that law modified by just and reasonable notice, condition, or declaration. It appears to me that the latter is the right construction. It is true that the notice, condition, or declaration (except it be within the Carriers' Act) would only be binding if either expressly or impliedly assented to by the customer, so as to constitute a contract "special" in the first sense. But the legislation as to that sort of "special" contract is exhausted before the 4th proviso is reached; and the new language of that proviso points (obscurely, it must be admitted, but perceptibly) to a more limited sort of special contract, that

\* 523 \* is, a contract for the nonce between a customer and the company, specially settling the terms of the particular bargain.

If what is contended for by the plaintiff had been intended, the word "special" might have been omitted, and the meaning of the proviso remain the same. I therefore give no meaning to the word "special," unless I read it as specifying individual cases out of the general course of business.

I do not discuss the cases, because they were stated so fully by my brother Blackburn; and as they exhibit a diversity of opinion, I am compelled to resort to the words of the statute, and to con-

<sup>1</sup> 4 H. & N. 327.

strue them as well as I can, without regard to that element of confusion.

I am bound to own that this opinion is at variance with the judgment in *M'Manus v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> in which I concurred, but which I am now unable to uphold.

MR. JUSTICE CROMPTON. — My Lords, having expressed my opinion on this case at considerable length in the Court of Queen's Bench, I propose to confine what I have to offer to your Lordships to a statement of what I conceive to be the effect of the 7th section of the Railway Traffic Act, and to answering as shortly as I can the questions put to us by your Lordships in conformity with what I conceive to be the true construction of that enactment.

Two matters appear to have called for the interference of the Legislature. The one was, that the companies through their monopoly had been, or were supposed to have been, in the habit of imposing harsh and unjust \* conditions upon indi- \* 524  
viduals, who could hardly be said to have the power of resisting any terms the companies might choose to impose upon them; and though these terms were not operative as conditions unless assented to, yet they were made operative by an assent express or implied; such terms on the one hand and such assent on the other forming a special contract between the parties.

The other matter was, that these special contracts had been inferred from parol evidence even in cases where the party sending the goods had done all he could to resist, but was deemed to have entered a special contract from having sent his goods with a knowledge of the conditions.

The Legislature appears to me, in the first part of the 7th section, to have said in effect, "Any terms or conditions, or notices, shall have no effect unless they are held reasonable by the Judge or Court"; in other words, "they shall not be operative, even in the only way in which they can be operative, by way of an assent or contract, unless adjudged reasonable. They shall not even be the ground or foundation of a contract by way of assent unless so held reasonable."

The first supposed mischief is thus provided against by saying, "Though you may have got the assent of the party, you shall still

<sup>1</sup> 4 H. & N. 327.

be liable for any loss occasioned by the neglect of the company or its servants, unless the conditions to which you obtain such assent are held just and reasonable."

After the introduction of some intermediate matter, the Legislature proceeds to declare what, I think, is a proviso on the previous allowances of conditions, which limits the liability of the company from loss occasioned by negligence or default, if held just and reasonable.

\* 525 \* The statute enacts that no special contract respecting the receiving, forwarding, or delivering goods, &c., as aforesaid, shall be binding unless signed, &c.

By the use of the same words as in the enactment in the earlier part of the section, "receiving, forwarding, or delivering," and by the use of the words "as aforesaid," the Legislature seems to me clearly to be referring to and making a proviso to refer to the former enactments. And I construe such proviso as meaning, "Although such conditions may be just and reasonable, yet it shall not be left to parol evidence to say what are the terms, nor shall you imply such assent as will make it a special contract unless it is signed by the party delivering." You shall not say, "The party knew of our terms, and must be taken to have consented to our conditions, so as to make out a special contract on the footing of those terms; but the contract must be proved by being reduced into writing, and the assent must be proved by the signature of the party." "Though notices and conditions of the nature of those as to which we have been legislating in the former part of the section have been treated as binding by the agreement of the parties, that is, by way of special contract, you shall not any longer make out such special contract by word of mouth, or even by delivering a printed notice, or by proving that the party knew of one, unless you prove his assent by his signature."

When the Legislature enacts that the party delivering shall be a party who may sign, it seems to me probably to have had in mind the practice of delivering printed notices to the party bringing the goods to the office, and to have been legislating with respect to the contracts that had been implied to arise from the delivery of such notices and conditions.

\* 526 \* I cannot think that this proviso now under discussion is, as was suggested at the bar, an enactment unconnected with the previous part of the section, and applying to any contract as

for the rate or payment for carriage of goods. I think that it was clearly intended to apply to the restriction which might be put on the liability from default or negligence, and that it is not applicable to any such contract as that referred to by Mr. Phipson in his argument, when he suggested that the proviso might be applicable only to such special contracts as the one, *ex gra.*, in *Nicholson v. The Great Western Railway Company*,<sup>1</sup> for sending large quantities of coal on the one hand, and for giving peculiar facilities to the senders on the other. I cannot understand how this can be the true construction of a clause which refers to the signature by the party bringing the particular goods as a party who may sign, and which seems to me clearly to include, even if it is not confined to, the case of the contracts supposed to arise from the goods being delivered and received, subject to conditions as to the responsibility of the companies.

The enactment is introduced as a further proviso by the words, "and be it also further provided," and by the other words I have referred to; and the object of the clause, as I understand it, leads me to think it an additional restriction on the stipulations which may be imposed by railway companies upon their customers. I think it extremely probable that it may have occurred, or have been suggested to the framers of the Act, that the companies might still say, as they did under the Carriers' Act, "You have forbidden conditions and notices to be operative, and so they are as conditions and notices, \* but we will get an assent of \* 527 the parties, and treat them as special contracts." And to obviate this, the Legislature may have intended by the subsequent proviso to prevent the making the conditions and notices operative by any extorted or presumed assent, or by loose verbal proof of what were the terms or the conditions upon which the goods were to be carried.

It does not appear to me to be any answer to this line of argument to say that the general Carriers' Act was misinterpreted, or that the decisions on it were wrong. It is not the Carriers' Act, but the Railway Traffic Act, that we have to deal with; and in construing that enactment we ought to look to the supposed state of the law and to the state of the decisions when that Act was passed; and I think that the right view was taken by my brother Blackburn when at the bar in arguing in the Court of Exchequer

<sup>1</sup> 5 C. B. N. S. 366.

Chamber in *M'Manus v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> where he says "That case was followed in *Carr v. The Lancashire and Yorkshire Railway Company*.<sup>2</sup> Mr. Baron Parke there said, 'If any inconvenience should arise from these contracts being entered into, that is not a matter for our interference; but it must be left to the Legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability.' The Legislature answered that appeal to them by passing the Act now in question."

A large majority of the Court of Exchequer Chamber adopted this view, and expressed concurrence in the decision of the case of *Simons v. The Great Western Railway*. [See the judgment as delivered by Mr. Justice Williams.<sup>3</sup>]

\* 528 \* I concur, therefore, in the construction put upon this section by the late Lord Chief Justice Jervis in delivering the judgment of the Court of Common Pleas in *Simons v. The Great Western Railway*,<sup>4</sup> a decision, as I think, of great authority; being the judgment of the Lord Chief Justice of the Court of Common Pleas, in which Sir Cresswell Cresswell and my brother Williams concurred, after argument on a demurrer, in which the question of the construction of the then recent Act of Parliament arose upon the record.

The first question on which your Lordships have required our opinion is, "whether the condition in question is a just and reasonable condition within the statute?"

I understand the condition as meaning that, unless the marbles were declared and insured according to their true value, the company is to be at no risk and under no responsibility. I think that this ought to be construed, both according to the modern authorities, and according to the plain ordinary meaning of the words, as excluding all responsibility, even for default or negligence of every description, however gross. Notwithstanding one earlier case, I do not think it at all safe to construe such a stipulation as impliedly excepting cases of gross negligence; indeed, if we depart from the plain ordinary sense of the words, I do not know what the exception should be; and I think it much better to adhere to the plain ordinary meaning of the words, and to abide by the modern decisions which my brother Blackburn has brought

<sup>1</sup> 4 H. & N. 327.

<sup>2</sup> 4 H. & N. 348.

<sup>3</sup> 7 Exch. 707.

<sup>4</sup> 18 C. B. 829.

before your Lordships with respect to the construction of such notices, stipulations, or provisions. I should have great difficulty in taking a refined distinction \* between a stipu- \* 529 lation to be free from any loss and injury as in the present case, and to be free from responsibility for any injury or damage, "however caused," which the Court of Exchequer rightly, in my opinion, decided in the case of *Carr v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> to include cases of gross negligence; and I think that a condition that the company shall not be responsible for losses, which appears to me to include losses by every species of gross negligence, ought not to be held just and reasonable; at all events where the only other alternatives offered to the party, are not to have his goods carried at all, or to pay a tenth of their value for a short railway journey, a proportion which certainly appears to me to be *prima facie* excessive and unreasonable.

The condition is to be void unless a Judge or Court shall hold it just and reasonable; and I as a Judge cannot say that it is made out to my satisfaction, that a condition is just and reasonable by which carriers say, "We will not carry your goods at all unless you pay us a tenth of their value, by way of insurance, in addition to the charge for carriage on such a journey, or unless you agree that we are not to be at all responsible, whatever negligence we may be guilty of, either by not providing proper carriages, or by any species of gross neglect or default of our servants in the course of the carriage." I think that this is the very kind of condition to which the Legislature means to prevent the companies from obtaining an extorted assent; and I therefore answer your Lordships' first question in the negative.

The second question is "whether the plaintiff is \* entitled \* 530 to the verdict on the 4th plea?" in other words, whether that plea was proved.

I think that it was not proved, not only on the ground that the condition, the foundation of the contract, was not just and reasonable, but also because, in my opinion, there was no such contract signed as the one alleged in the plea. I entered so fully into the consideration of this part of the question in the Court below, that I do not wish to trouble your Lordships with repeating what is already in print. Nothing which has been brought forward on the

<sup>1</sup> 7 Exch. 707.

present occasion has satisfied my mind that the signed order to "forward the goods uninsured," is a contract reduced to writing and signed, by which it appears that the party agrees to the particular consequences stated in the plea in case of the nonpayment of the insurance. It seems to me merely to say, I will pay no insurance money; and the part of the alleged contract which states the consequences of such non-insurance and payment, seem to me to be entirely introduced by that parol evidence which it was the object of the statute to make inoperative. There was no pretence of any general custom of trade which could be incorporated into the contract; but different companies impose different consequences for such non-compliance with their terms. I cannot see that the particular contract alleged in the plea is made out from the terms reduced to writing in the signed paper, or in any written document referred to in the signed paper, according to the well-established rules of law on the subject. And indeed, if such parol evidence were admissible, it would rather seem to me that the terms in the plea were not the terms of the real bargain, which was for an insurance at the arbitrary amount of ten per cent., and not at a reasonable amount according to the value of the goods, which seems the meaning of the agreement as stated in the plea. But, however this may be, I think that the signing a paper saying, "I will pay no insurance money, but do you forward the goods uninsured," is not signing a paper containing the consequences of such non-insurance as alleged in the plea, and therefore that the terms of the contract alleged in the plea are not proved by such signed paper.

I therefore answer your Lordships' second question in the affirmative.

The same reasons lead me to the conclusion as to the question put by your Lordships with reference to the 5th plea. I think that the condition is not made out to be just and reasonable, and that it was not assented to so as to be a binding condition, as the assent was not by a signature to a written paper containing the terms of the alleged condition or contract; and, therefore, that the verdict on the 5th plea, also, should be for the plaintiff; and I therefore answer your Lordships' third question, also, in the affirmative.

It may be worth remarking, that the questions on the two special pleas come before your Lordships in a different form. The case

states properly that the judgment of the Court of Queen's Bench was reversed, and that is practically so, as the Exchequer Chamber held that a good plea, the 4th, was proved; and, therefore, the judgment *quod recuperet* could not be sustained; but that Court only ordered the verdict to be entered for the plaintiff on the 4th plea, leaving the verdict on the 5th plea to stand, probably thinking that your Lordships were the only proper tribunal to deal with the question on the 5th plea, after the decision in the similar case of *M' Manus v. The Lancashire and Yorkshire Railway Company*, in the Exchequer Chamber. See the end of \*582 the judgment of the majority of the Court in the present case, delivered in the Exchequer Chamber,<sup>1</sup> where it is stated that the judgment of the Queen's Bench is to be reversed to the extent that the verdict be entered for the defendants on the 4th plea.

The general result, therefore, is, that the verdict now stands, as entered by the Court of Queen's Bench for the plaintiff in the action, on the 5th plea, until reversed by your Lordships; and that the verdict on the 4th plea stands for the defendants as entered by the Exchequer Chamber, until reversed by your Lordships.

MR. BARON MARTIN, after stating the facts of the case, said: As I shall have occasion hereafter to state, I myself have no doubt of the meaning of the term "not insured," as understood by the parties to this transaction; but the previous correspondence, and the evidence, establish clearly that it meant that the goods were to be conveyed at the rate of 55s. per ton, the ordinary rate for carriage of goods not insured, and that the owner was to take upon himself the risk covered by the increased rate of charge when goods were insured. And I may observe, that in the discussions which this case has undergone, it has been taken for granted that the injury to the marbles was of a character for which the carrier, at the ordinary rate for carriage, would not be responsible, if any distinction could be lawfully made between goods insured and goods not insured.

This case came before the Court of Queen's Bench, and the judgment is to the effect that, assuming the condition to be just and reasonable within the proviso, it \*was of no avail \*583 to the defendants upon either the 4th or 5th plea, inas-

<sup>1</sup> *Ellis, B. & E. 996.*



much as there was no signed assent to it by the plaintiff or his agent. Mr. Justice Erle differed from the two other Judges, the Court being composed of three.

When the case came before the Court of Exchequer Chamber, *M'Manus v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> had been decided, and the learned counsel for the defendants considered it conclusive in that Court that the condition was not just or reasonable; and it is an error to suppose that there is any thing in the judgment of the Court of Exchequer Chamber at variance with *M'Manus's Case*; on the contrary, *M'Manus's Case* was assumed to have been correctly decided. The point argued in the Exchequer Chamber was, that there was a special contract, as alleged in the 4th plea, duly signed within the 4th proviso of the 7th section; and the majority of the Court was of that opinion.

In the argument at your Lordships' bar, three points have been discussed. First, whether upon the true construction of the 7th section a signed assent to the condition is necessary. Secondly, whether the condition itself be just and reasonable. And, thirdly, whether the 4th plea has been legally proved. And the questions proposed by your Lordships to the Judges involve the necessity of giving an opinion upon them all.

The first point depends exclusively upon the construction of the 7th section of the Railway and Canal Traffic Act. Upon this there has been much difference of opinion, and it is of importance that it should be finally settled by a binding and conclusive judgment. In order to determine its true meaning, it is es-

\* 534 sential to ascertain \* what was the existing law at the time of its enactment, and more especially the operation and effect of the Carriers' Act, 1 Wm. 4, c. 68. At common law, a common carrier of goods for hire was responsible for the safe delivery of goods, except prevented by the act of God or the Queen's enemies, or in other words, was practically an insurer; and is so called frequently in the books. But at the time of the passing of the Carriers' Act, carriers' notices were in general use. What was their precise operation, whether as creating a limitation upon the common-law liability by the mere expression of the will of the carrier, stating the terms and conditions upon which he did business, and the customer delivering goods to be carried having

<sup>1</sup> 4 H. & N. 327.

knowledge of them; or as creating a special contract between them, to which the assent or agreement of the customer is an essential element, was and is a matter of doubt and controversy. But it may be stated as certain that these notices operated, to a considerable extent, to protect carriers against unforeseen losses and misfortune; but did not, however general and extensive in their language, protect against misfeasance or gross negligence. The Carriers' Act contains but few sections; and if the true meaning of the term "special contract" in the 6th section be ascertained, it seems to me that the construction of the 7th section of the Railway and Canal Traffic Act is free from reasonable doubt.

The Carriers' Act enacts that a carrier may, by a notice affixed in his office, state an increased rate of charge to be paid over and above the ordinary rate of carriage, for the safe conveyance of certain enumerated goods mentioned in the 1st section, when the value of the parcel exceeds 10*l.*; and all persons delivering goods at the office are bound by the notice, and unless the nature and \* value of such goods be declared, and the increased \* 535 rate of charge paid or contracted to be paid, the carrier shall not be liable for loss or injury, except it arise from the felonious act of his servant; and that with regard to the enumerated goods in parcels not of the value of 10*l.*, and all other goods whatsoever, no public notice or declaration shall affect the liability of the carrier, but he shall be liable as at common law. The same section which provides for the felonious act of the servant, enacts that nothing in the Act shall protect the servant himself from liability for loss or damage occasioned by his now personal neglect or misconduct. These sections refer to the public notice or declaration of the carrier, and expressly enact what it may be, what shall be its operation, in what cases alone it shall protect the carrier, and in what it shall be of no avail to him. But the 6th section provides that nothing in the Act shall extend to annul or in any way affect a special contract between the carrier and customer for the conveyance of goods.

I have already observed that it was the opinion of some, that the manner in which the carriers' notice operated before the statute, was by the creation of a special contract between the carrier and customer, and my brother Crompton, in his judgment in this case, states that this is its operation. Assuming this to be

the correct view, it seems to me clear that the special contract so created, is not the special contract contemplated by the 6th section, and that of necessity it must be one different from it. The statute provides, in express terms, what shall and what shall not be the operation of the public notice or declaration by the carrier. The circumstance of the customer having knowledge of it, or even in express terms dissenting from it, is immaterial. Whether he

knew of it or is ignorant of it, whether he assents to it or \* 536 dissents \* from it, is of no consequence. The Legislature

has enacted what the effect of the carriers' public notice or declaration shall be, and all are bound by it. But at the time of the passing of the Carriers' Act, special contracts, ordinarily so called, were in use between carriers and their customers. Manufacturers sending goods largely by carriers, made contracts with them on defined terms, specifying, for instance, how the goods were to be protected from wet or injury during the journey ; within what time notice of damage should be given to the carrier ; how the value or amount of it should be ascertained, and other terms which were deemed by the parties desirable to be expressed ; and I have no doubt that the primary object of the 6th section was to prevent any question as to the validity of such contracts. It may also well have been that when goods of a nature peculiarly liable to injury were sent by a carrier, a special contract was made in respect of them, and, in my opinion, the special contract contemplated in, and provided for by, the 6th section, is an express individual contract entered into between carrier and customer, to specify the terms of agreement between them, and not the contract (so to call it) arising from the giving a public notice by the carrier, and the assenting to it by the customer, evidenced by his delivering goods to be carried with the knowledge of it. I am quite aware that the term "special contract" may be found applied, and not inappropriately, to the bailment created by the delivery of goods to the carrier to be carried with knowledge of the notice ; but when the statute enacts what the notice may be, and its operation, and that any other shall be of no avail, but that special contracts shall be wholly unaffected by it, it to my mind amounts to demonstration that the special contract contemplated

\* 537 by the Carriers' Act, is a thing different from \* the implied special contract consequent upon the notice. To hold it to be so would nullify the Act, and render it of no avail ;

for every sending of goods with knowledge of a notice would be said to be a special contract, and within the 6th section.

It is true a question, and one of some difficulty, may occasionally arise, whether a particular transaction between a carrier and a customer be upon the public notice or a special contract; and when it does, and it is material to distinguish, it will be a question of fact for the jury upon a proper direction.

The Railway and Canal Traffic Act was passed in the year 1854. The 7th section is quite unconnected with the preceding ones. It is needless to comment upon its composition, or speculate how it came to be framed as it is. It consists of one enactment and five provisoes. The enactment is, that every company within the Act shall be liable for the loss of, or injury to, any horses, cattle, or other animals, or to any goods in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of the company or its servants, and any notice, condition, or declaration to the contrary, or in any wise limiting such liability, is null and void. It has already been seen that in the Carriers' Act provision is made for liability for loss or damage occasioned by the personal neglect or misconduct of a servant of the carrier, and this enactment seems to extend the remedy, and render every company within the Act liable for loss of, or injury to goods caused by the neglect or default of the company or its servants.

And this would probably be held to be the construction of the Act, notwithstanding that the last of the five provisoes is, that the Carriers' Act shall remain unaltered, \* and un- \*588 affected with respect to articles of the description mentioned in it.

Now, it is to be observed that the term "special contract" is not in this enactment. The words are "notice, condition, or declaration." In the Carriers' Act the words are "notice or declaration." And, as for the reasons already given, I think the terms "notice" and "declaration" in the Carriers' Act are used in contradistinction to "special contract" within the 6th section, so also I think that the terms "notice, condition, and declaration" in this section are used in the same sense, and do not include special contracts, which in my opinion are left free and unaffected as they were in the Carriers' Act, except as provided by the 4th proviso.

This enactment is followed by the 1st proviso, that nothing in

the Act shall prevent the companies within it from making such conditions with respect to the receiving, forwarding, and delivering animals and goods, as shall be adjudged by the Court or Judge before whom the question shall be tried, to be just and reasonable. The condition in question was made under the authority of this proviso. The term used in it is "condition," which is interposed in the enactment between the words "notice and declaration," but they all three mean the same thing, viz. the terms published by the companies of their own act and will, as those upon which they will do business as carriers. It has been seen that the Carriers' Act restricts carriers to one condition only, viz. that of declaring the nature and value of parcels containing the enumerated goods of the value of 10*l.* and paying the increased rate; but this proviso takes off the restriction as regards companies within the Act, and enables them to make conditions, provided

\* 589 they shall be \* adjudged to be just and reasonable by the Court or Judge.

The judgment of the Court of Queen's Bench was, that there must be a signed assent by or on behalf of the customer to the condition. If so, why, it may be asked, were not the same words used in both the enactment and the 4th proviso, which are apparently independent of, and certainly have no reference to, each other. But I believe the Legislature intended the contrary, and by the word "condition" meant one thing, and by "special contract" another and different; and that, as already said (subject to the requirement of being signed by or on behalf of the customer as provided in the 4th proviso), special contracts are left unaffected as they were by the Carriers' Act. The 2d proviso relates to animals. The 3d has no reference to the question in controversy. The 4th is that there must be a signed assent or agreement to special contracts. For the reasons already given, I think this proviso does not relate to the condition mentioned in the 1st proviso, but to what it expresses, viz. special contracts, and that it is merely a qualification upon the 6th section of the Carriers' Act, and nothing more.

The result is that, in my opinion, both these Acts of Parliament contemplate two things, viz. the notice or condition or declaration emanating from the carrier himself of his own mere act and will, and of which the customer has actual or implied knowledge, and special contracts to which the assent or agreement of both parties

is an essential element, and which by force of the 4th proviso must be signed by or on behalf of the customer, and therefore must of necessity be in writing. This is the important point in the case, but its bearing is upon the third question proposed by your Lordships, viz. \* whether the 5th plea (that framed \* 540 upon the condition) was proved by the defendants. The judgment of the Court of Queen's Bench was that it was not, for the want of a signed assent. I, however, concur with Mr. Justice Erle, that it was not essential that it should be signed.

This further observation may be added : If "condition" in the 1st proviso means what I believe it does — a condition emanating from the companies themselves, of their own free act and will — it is not unreasonable or contrary to any legal principle to interpose for the protection of the public, and submit to the judgment of the Court or Judge, whether it be just and reasonable. But if it means special contract properly so called, it would be perfectly novel and contrary to all legal principle to give a Court or Judge any such jurisdiction. Contracts are to be judged of by their legality according to the rules of law, not by the opinion of Courts or Judges as to their justness or reasonableness.

In conclusion, I desire to observe that the question depends upon the construction of a section in an Act of Parliament. The 1st proviso deals with a condition, which manifestly is the condition mentioned in the enactment, and this is a condition made by the company, made by one party only. The 4th proviso deals with contracts between the company and other parties respecting the receiving, &c. of goods, or, in other words, between the company and a customer, and to a contract the agreement of two parties is essential, and it is this contract which is required to be signed. It seems to me that the "notice, condition, or declaration" of the 1st proviso is a thing different from the "special contract" of the 4th, and that the Carriers' Act shows what they respectively mean. And amidst the multitude of conflicting cases and opinions the only safe course is to abide by \* the language of the \* 541 Legislature, adopting the construction which ought originally to have been put upon it.

The next question which arises is, whether the condition be just and reasonable. And this, in my opinion, depends upon what is its legal construction. If it be that the company should not be liable for the actual neglect or default of its servants, it would be

directly contrary to the enactment; and I should think it neither just nor reasonable, as it seems to me the bailment of carrying goods for hire or reward, of itself and of necessity, imposes the obligation upon the carrier, at the least, of the avoidance of actual negligence or misfeasance. But the cases of *Lyon v. Mells*,<sup>1</sup> and *Garnett v. Willan*,<sup>2</sup> and other cases, have established that this is not the legal construction of such conditions, and that they are to be read as providing against unforeseen and unexpected losses and injuries not occasioned by actual negligence or default. And, reading the condition in this sense, I think it just and reasonable, at least I cannot say it is unjust or unreasonable, when the plaintiff's agent, having the fullest notice of it, elected to send the marbles under it without objection or complaint. There were many other modes of conveyance from Stoke-upon-Trent to London besides this railway. I may here conveniently state that I think the defendants proved their fifth plea, that the condition there set out may be read in the same sense as the condition itself, and that if in fact the injury to the marble had arisen from actual negligence or misfeasance, it ought to have been new assigned.

The above are substantially my answers to your Lordships' first and third questions.

As to the second question, I have to assume that I am  
 \*542 \*in error in my construction of the 7th section, that the term "condition" in the 1st proviso means the same thing as "special contract" in the 4th; and that to render a condition made by a company of avail, it must not only be just and reasonable in the opinion of the Court or Judge, but must be embodied in a writing signed by or on behalf of the customer. And assuming this to be so, I think the judgment of the Court of Exchequer Chamber right, and that there is evidence of such a contract between the parties, signed so as to satisfy the requirement of the 4th proviso, and that it is evidence of the contract alleged in the 4th plea. The plea avers that the goods were delivered to the defendants after the passing of the Railway and Canal Traffic Act of 1854, and under and subject to a certain special contract signed.

The facts are these. The plaintiff's agent had express notice of the condition before stated, and had had a correspondence with the defendants' head clerk as to the rates which would be charged

<sup>1</sup> 5 East, 428.

<sup>2</sup> 5 B. & Ald. 53.

if the goods were insured or not insured, and was informed that if not insured the rate was 55s. per ton, but if insured the rate would be 10l. per cent. on the declared value in addition. Thereupon the plaintiff's agent wrote the letter of the 1st August, "Please forward the three cases of marble, not insured," &c., and the defendants forwarded them at the not insured rate. Now I think that this letter and the defendants' conduct upon it constituted a contract between the parties; that the letter was a proposal, and the defendants' conduct an unconditional acceptance of it. And, according to *Smith v. Neale*,<sup>1</sup> the proposal on behalf of the plaintiffs being in writing, and signed and unconditionally accepted, satisfied the requirement of the \*4th proviso. I therefore \*543 think the averment was proved that the goods were to be carried under and subject to a special contract.

The next question is, was there evidence in writing of the contract averred in the plea, viz., it was agreed that the defendants should not be responsible for the loss or injury to the marbles, unless declared and insured according to their value. It is contended that, in accordance with the cases upon the Statute of Frauds, inasmuch as there is no reference in the letter of the 1st of August to the previous letters or documents, they cannot be had recourse to to make out the contract, and I assume this to be so, and that the question depends upon the meaning of the term "not insured" in this letter. In almost every trade there are certain terms and expressions used by the persons dealing in them which are not intelligible to strangers to the trade. For instance, in the trade of insurance the word "average" is in constant use, having a meaning quite different from its ordinary understood sense. So also there is the word "prompt," which is to be found almost universally in London bought and sold notes and contracts of sale. This word as used would be unintelligible to persons unacquainted with trade terms and language. And I apprehend that when such terms have been long in use, and of frequent occurrence in Courts of law, the Judges are as much bound to know their meaning, and apply them, as they are bound to know and apply the ordinary terms of law, which are quite unintelligible to persons not lawyers. Now the terms "insured" and "not insured" have long been in use in the carrying trade; they will be found in the carriers' notices in the earliest cases upon the sub-

<sup>1</sup> 2 C. B. N. S. 67.



ject, and I think are substantially recognised in the Carriers' Act.

The distinction is there expressly made between the ordinary \* rate of charge for carriage, which is the non-insured rate, and the increased rate of charge when the value and nature of the goods are declared, which is the insured rate, and when these marbles were directed to be forwarded not insured, I think it indicated that the goods were to be forwarded at the ordinary rate of charge, and not at the insured rate; and that the owner would take upon himself the risk of the loss or injury, which would have been to be borne by the defendants if the nature of the goods were declared and an insurance paid according to their value. Now, if this risk was to be borne by the owner, it is the inevitable consequence that the defendants were not to be responsible for it, which is the agreement averred in the plea. The remaining averment was clearly proved, and in my opinion the defendants are entitled to have the verdict upon it entered for them.

I have hitherto confined myself entirely to the letter of the 1st August, because I am myself satisfied that all parties understood it as I have above mentioned. But I apprehend there can be no doubt whatever that when it is to be determined what is the meaning of a particular expression in a letter, previous correspondence between the parties upon the subject may be looked at in order to ascertain it. The cases upon the Statute of Frauds are not to the contrary, and reason and common sense point it out as one of the best, probably the very best, tests of exposition. Applying this test, the previous letters show the meaning of the term "not insured," to be what I have stated beyond, as it seems to me, the possibility of cavil or doubt.

For the above reasons, I answer your Lordships' first question in the affirmative, and the second and third in the negative.

I beg to refer to the case of *Harrison v. The London and Brighton Railway Company*,<sup>1</sup> in which the questions arising in this case have been discussed.

MR. JUSTICE VAUGHAN WILLIAMS. — My Lords, before answering your Lordships' questions separately, I think it better to express my opinion generally as to the construction of those parts of the 7th section of the Statute 17 & 18 Vict. c. 81, which relate to the points in controversy.

<sup>1</sup> 2 Best & S. 122.

A proper course for arriving at the meaning of these enactments may be to examine the section as if it stood without the introduction of the 1st proviso. It would then, by its first clause, declare to be null and void every notice, condition, or declaration made and given by any railway company, in any wise limiting their liability for the loss of or for any injury to any goods, &c., if occasioned by their neglect or default.

On comparing this enactment with the corresponding one in the 4th section of the Carriers' Act (11 Geo. 4, and 1 Wm. 4, c. 68), it may be noted that the Statute of Victoria omits the word "public," which was prefixed to the words "notice and declaration" in the Carriers' Act (and which was regarded as so material by the Court in *Walker v. York and North Midland Railway Company*,<sup>1</sup> and further, that it superadds a declaration that the notices, conditions, and declarations shall be null and void. And the effect of the clause, were it not qualified by the subsequent proviso, is, as it seems to me, not only to render all such notices, conditions, and declarations inoperative *per se*, but to nullify all contracts which shall be founded on any assent to them.

What, then, is the effect of the proviso having been \* introduced, that the statute shall not prevent the com- \* 546 panies from making such "conditions" with respect to the receiving, forwarding, and delivering of goods, &c., as shall be adjudged to be just and reasonable? The effect appears to be, that the first clause of the section does not apply to such conditions; but they are allowed to operate as they did before the statute passed.

Now, though it has been contended on behalf of the defendants that they operated as limitations which a carrier had the power of imposing on his common-law liability by way of special acceptance, without the assent of the customer, yet a long series of cases has, in my opinion, established beyond all question, that they operated only as special contracts. These cases have been so fully cited and clearly explained by my brother Blackburn, that it would be wrong if I were to trouble your Lordships by any further statement of them.

If this be so, it remains to inquire whether the conditions thus saved by this earlier proviso do not necessarily fall within the subsequent proviso, which enacts that no special contract shall be binding unless it is signed.

<sup>1</sup> 2 Ellis & B. 750.

This has been denied, on the suggestion that the term "special contract" there employed, ought not to be understood as comprising conditions emanating from the carriers themselves, and assented to by the customer, but as applying only to contracts properly so called, made with particular persons in the usual way by mutual bargain. And inasmuch as it is manifest that if the reasonable conditions saved by the earlier proviso are to be deemed special contracts within the later, it must follow that every such condition, in order to be binding, must be reasonable, as well as signed; it is further argued that a party to a contract ought to reflect and be his own judge as to the reasonableness of the contract \* 547 before he executes \* it, and that it is improbable that the Legislature could have meant to invade the ordinary principle of justice which forbids him to avoid it by asserting it to be unreasonable. But the words of the proviso seem to show that the statute, by the expression "special contract," did mean to include the ordinary transaction of a condition proposed by the companies to a customer, and assented to by him; for the proviso allows a signature of the special contract to be sufficient if made by the customer, or by the person delivering the goods for carriage, which appears to point to the case of a contract arising simply out of the transaction of goods brought to a railway by a servant of the owner, who is required in the usual way to sign the ticket, expressing the conditions on which the company receive the goods. And as to the suggested invasion of the principle that a party who has chosen to enter into a contract shall not be allowed to dispute its being reasonable, it must be observed that the proviso does not apply to all special contracts between railways and their customers, but only to such as respect the "receiving, forwarding, and delivering" of goods, &c.; and further, that the special contracts, the reasonableness of which, according to the plaintiff's contention, the Legislature allows the customer to dispute, are confined to conditions by which the companies limit their liability as to the "receiving, forwarding, and delivering" of goods. Considering that these conditions are usually imposed suddenly at the moment of delivery, when due reflection as to their import and extent, or a repudiation of them, if not impracticable, is at least inconvenient and irksome to the customer, or the servant he employs to deliver the goods to the company, it does not appear to me to be an absurd or harsh piece of legislation to enact that, notwithstanding the company

obtains \* the requisite signature to the special contract, \* 548 it shall still be open to the customer to contend before a Court that the conditions contained in it cannot be regarded as just and reasonable.

On these grounds I am of opinion that the true construction of the Act is that put upon it by the Court of Common Pleas in *Simons v. The Great Western Railway Company*, viz. that a condition limiting the liability of a railway company for loss or injury occasioned by the neglect or default of the company or its servants, is null and void, unless it is just and reasonable, and stated in a signed contract.

It follows that I must answer your Lordships' third question in the affirmative, because (as it was put by my learned brother Crompton in the Court of Queen's Bench) the 5th plea avers that the defendants made the condition, and that the plaintiff assented to it; and as I am of opinion that, according to the true construction of the statute, there was no binding assent, the plaintiff is entitled to have the verdict entered for him on that plea.

As to the first of your Lordships' questions, I answer it in the affirmative, for the reasons given by Lord Chief Justice Erle, in the judgment which he delivered on the second point in *Harrison v. The London and Brighton Railway Company*.<sup>1</sup>

As to the second question of your Lordships, I am of opinion that the plaintiff is entitled to have the verdict entered for him on the 4th plea. I have heard nothing in the arguments at the bar of this House, which has altered the opinion which I expressed on this point in the Exchequer Chamber, to which I crave leave to refer your Lordships.

\* LORD CHIEF BARON POLLOCK. — My Lords, in answer \* 549 to the first question of your Lordships, I am of opinion that the condition (understood, as I think it must be understood, with reference to the Statute 17 & 18 Vict. c. 31, § 7) is a just and reasonable condition.

The 7th section of the statute makes every notice, condition, or declaration null and void, which limited the responsibility of the company for loss or injury occasioned by the neglect or default of the company or its servants. But it is expressly provided in the same section that it shall not prevent a company from making con-

<sup>1</sup> 2 Best & S. 166, 167.

ditions, which I understand to mean from limiting its responsibility with reference to other accidents or mischief not arising from the neglect or default of the company or its servants (for which, as insurers, companies would otherwise by law be liable), and I think this condition must be read as applying to those cases in which it was competent to the company to limit its responsibility, and not to those where it was not. And so reading it, it appears to me to be a most reasonable and just condition ; and indeed it is in the spirit of the 2d proviso. It is quite right that carriers should be responsible for their own negligence and that of their servants ; but when they are called upon to pay for damage as insurers only, common fairness seems to require that they should be paid according to the risk they run ; that is, according to the value of the goods.

In answer to the second question, I am of opinion that the plaintiff is not entitled to have the verdict entered for him upon the 4th plea, because it appears to me that the 4th plea was proved. I think a contract may always be explained by the surrounding circumstances, just as a will, or indeed any other instrument may ; and looking at the surrounding circumstances,  
 \* 550 I think the \* letter of the 1st August is alone sufficient and satisfactory evidence of what the parties meant. But if there be any doubt whether that letter alone would be sufficient, I am of opinion that, coupled with the rest of the correspondence and written communications, the meaning and intention of each party is perfectly clear, and they came to the agreement stated in the 4th plea, which was signed in the note of August 1st.

In a case where a contract is to be collected from a correspondence, and a letter is written in answer to another letter, I apprehend if it be clearly shown that the second letter was in fact written in answer to the first, the first may be read to explain the second, although the second does not expressly refer to it. On the 10th July, 1857, a letter was written from Meigh & Son to the defendants, inquiring the rate of insurance on marble. Subsequently to that letter of inquiry, the defendants delivered to Mr. Meigh the conditions, among which was, " That the company shall not be responsible for the loss of or injury to marbles, &c. unless declared and insured according to their value." There was some other correspondence in writing on the subject, which, without reference to any verbal communications, in my judgment leaves no

doubt what was meant by the letter of the 1st August. It appears to me that from what passed in writing between the parties (and I think we ought to look at the whole of it), the meaning of the letter of the 1st August becomes no longer doubtful; and that the 4th plea is proved.

In answer to the third question, I am of opinion that the plaintiff is not entitled to have the verdict entered for him upon the 5th plea. The 7th section of the statute, while it renders void any condition which would exempt the company from liability to loss arising from \*the neglect of companies or \*551 their servants, leaves it open to them to make any condition, which shall be deemed just and reasonable by the Judge before whom the question shall arise, that limits their liability as to other losses, which I take the present to be. In a second proviso, the loss to be recovered for injury done to animals is limited as to each class, unless at the time of delivery a higher value is declared; in which case the company is authorised to demand by way of compensation for the increased risk a reasonable percentage on the excess of the declared value. There is then a proviso that no special contract between the company and any person delivering goods to be carried, shall be binding unless the same be signed by the party or the person delivering the goods. It is quite clear that beside the general condition attached (when lawful and just and reasonable) to certain articles and certain branches of trade, it was quite competent to the company to enter into a special agreement in any particular case, taking that individual delivery out of the general law as to carriers, and also out of any general condition or declaration made by the company in pursuance of the first proviso in the 7th section. And this right on the part of the carrier to make a special contract with his customer is recognised and protected by the 6th section of the 11 Geo. 4, and 1 Wm. 4, c. 68, by which it is provided that nothing in that Act shall be construed to annul or affect any special contract between the carrier and the person whose goods are to be conveyed. And this is the sort of special contract which by the 4th proviso is required to be signed. Such special contracts might arise in various cases, such as on the carriage of treasure or articles of extraordinary and unusual value, or of race-horses, or horses for breeding, which might require particular accommodation; and to guard against fraud, they are \*required by the last \*552

statute to be signed. It seems quite superfluous to allow the company to make general conditions, and at the same time to require that in addition to a full knowledge of such conditions, and the notice thereof, and acquiescence therein, there shall be in every case of such delivery a special contract signed. No doubt technically an arrangement by which the owner of the goods delivers them to the company subject to a condition or declaration, and the company accepts them accordingly, may be technically considered a contract, and in one sense a special contract. But it is not, in my judgment, the sort of special contract meant by the proviso in question. I think the sort of contract which arises out of a general notice applicable to all goods of a certain description is rather a general contract than a special contract. And I think the fourth proviso, which requires the special contract to be signed, relates only to a special contract belonging to the particular individual case, and not to a contract arising out of a notice or condition as to the mode of conducting a particular branch of railway business.

In this Court of Error before your Lordships, I am entitled to say that on this point I differ from the judgment of the Court of Exchequer Chamber, in the case of *M<sup>r</sup> Manus v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> and from the opinion of Lord Chief Justice Jervis, on which it was founded, in *Simons v. The Great Western Company*. And with the greatest respect for the learned Judges who delivered the judgments from which I differ, it appears to me that when they delivered those judgments, they omitted to consider that "special contracts," *eo nomine*, were mentioned and provided for in the earlier Act; and that the

\*553 4th proviso of the 7th \*section of the later Act merely requires such special contracts to be in writing.

LORD CHIEF JUSTICE COCKBURN. — My Lords, I am of opinion that the first question put by your Lordships in this case should be answered in the negative. The effect of the condition to which the question refers is to secure immunity to the company from all liability in respect of injury arising from its own negligence in the event of goods not being declared and insured according to their value. I am of opinion that such a condition is not a just and

<sup>1</sup> 4 H. & N. 348.

reasonable condition within the true intent and meaning of the 7th section of the 17 & 18 Vict. c. 31.

In considering this question, it appears to me important to bear in mind that, in every system of law with which we are acquainted, the contract of the carrier involves the obligation of applying reasonable care and diligence in the custody and conveyance of the thing to be carried. No doubt it was always by our law competent to a carrier, in respect of articles as to which he did not hold himself out as a common carrier, to insist on a special contract, and by the terms of it to limit the extent of his liability. But the fact that, in the absence of any special agreement, which, of course, would supersede the law, the obligation to use due care and diligence in dealing with the subject matter of the bailment attached, by operation of law, upon the contract to carry, shows that, in the eye of the law, it was deemed reasonable that this obligation should form part of the duty of the carrier. It is, no doubt, equally true that the interference of the Legislature in passing the 1 Wm. 4, c. 68, commonly called the Carriers' Act, also shows that, in the opinion of the Legislature, the liability of the carrier at common law went beyond what was just and reasonable. I think \* it may be doubted whether the in- \* 554

tention of the Legislature in passing the Carriers' Act was to do more than to relieve the carrier from that larger responsibility which the common law casts upon him, and whereby he became liable, as an insurer, for loss or injury arising from causes against which no care or diligence could guard. It may be doubted whether the intention was to enable the carrier, by a mere notice, to relieve himself, even in respect of the exceptional articles to which the Act refers, from all responsibility for negligence unless a premium were paid to him to insure due attention and care on his part. Such, however, has been held to be the effect of the language and provisions of the Act, taken together; and, judicially speaking, I cannot but acquiesce in the propriety of such construction. Be this, however, as it may, it is obvious that the cases provided for by the Carriers' Act stand on a peculiar ground. In the articles to which that Act relates, the value of the commodity to be carried is so immensely disproportioned to the bulk, and consequently to the freight received by the carrier, that while the freight would be inadequate to compensate him for the risk incurred, the consequences of negligence by a servant



might involve him in utter ruin. The Legislature, therefore, might well authorise the carrier to insist, not only on having the nature of the article declared to him, but also on the payment of an increased freight, or that the article shall be carried at the entire risk of the owner. In like manner the value of a race-horse, or of animals of a particular breed, may in some instances be so far beyond the ordinary run, that the ordinary rate of freight may be an inadequate remuneration to the railway carrier for incurring the risk of having to make good loss arising from the negligence of servants. Hence the protection afforded by the 2d proviso of this section.

\*555 \*In all these instances the Legislature has thought it reasonable (doubtless on the ground to which I have referred) that the carrier should be protected from liability unless a higher freight be paid. But, in thus providing, the Legislature has been careful to enumerate specifically the particular articles in respect of which the carrier should have this immunity. Nowhere is it said that the provisions of the Carriers' Act may be extended to any article not mentioned in it, even though, to use the language of this condition, such article may be "more than ordinarily hazardous." I cannot but think that we have thus a legislative exposition afforded us of the extent to which Parliament deemed it reasonable that the carrier should be absolved from the liability to which he would ordinarily be subject. And though, of course, I readily concede that the legislation to which I have been adverting leaves special contracts untouched, yet, in construing a statute by which the Legislature has intended to put a restraint on the power of carriers to protect themselves by special contracts in respect of negligence, the extent to which Parliament in affording to carriers a statutory protection has thought it reasonable that that protection should go, appears to me not an unsafe or inappropriate guide.

I cannot but look upon the statute which your Lordships are now called upon to construe as a very salutary one. It certainly was intended to be a remedial one; and its efficacy should not, as I humbly think, be lessened by judicial exposition. In construing such a statute I am fully sensible, as, no doubt, Parliament was in passing it, of the great importance, as a general rule, of leaving parties free to make their own contracts. But even a rule so sound and general in its application is subject to exceptions; and

one of these is the case where, as in the present instance, one of the contracting parties \* is entirely in the power of \* 556 the other. There cannot be a doubt that, practically speaking, the introduction of railways has destroyed the competition which formerly existed, and the effect of which was to secure to the goods owner fair and reasonable terms from the carrier between certain distant termini. Between some, indeed, where there happens to be more than one line of railway, as, for instance, between London and York, or London and Exeter, some competition may be said to exist, but over the greater portion of the country, and even on the lines to which I have just referred, between all the intermediate places, it is idle to talk of competition as practically existing. On the other hand, the absence of other means of conveyance, as well as the increased rapidity of transport, compels the owner of goods, at least for all the purposes of business, to resort to railway conveyance. He is thus at the mercy of the carrier, and has no alternative but to submit to any terms, however unjust and oppressive, which the latter may think fit to impose.

The history of the judicial decisions which have taken place on contracts of this nature, and the legislation which has followed on those decisions, abundantly show that the Act which your Lordships are now considering was passed by the Legislature for the express purpose of protecting the public from the abuse of a power which the Legislature itself, by assisting to create these great companies, had helped to bring into existence. Masters of the field, railway companies lost no time in introducing into their contracts conditions of immunity, not only against liability in respect of loss or injury arising from circumstances beyond their control, but also against liability in respect of loss or injury resulting from their own negligence, however gross and inexcusable. And to these stipulations Courts of law felt themselves compelled \* to give effect, on the undeniable principle that, \* 557 in the absence of fraud or illegality, Courts of justice are bound to give effect to conditions, however stringent and oppressive, to which the parties to a contract have deliberately agreed. Thus, for instance, in *Shaw v. The York and North Midland Railway Company*,<sup>1</sup> as also in *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*,<sup>2</sup> the plaintiff's horses, and in *Chip-*

<sup>1</sup> 13 Q. B. 347.<sup>2</sup> 16 Q. B. 600.

*pendale v. The Lancashire and Yorkshire Railway Company*, the plaintiff's cattle, had been injured by the negligence of the defendants' servants; yet, as in each of these cases, the plaintiff had signed a memorandum that all risks of conveyance were to be borne by the owner, the defendants were held free from all liability. The climax to this series of decisions occurred in the case of *Carr v. The Lancashire and Yorkshire Railway Company*.<sup>1</sup> There the company, on undertaking to carry the plaintiff's horse, had made him sign a ticket, on which was printed a condition that the plaintiff should undertake "all risks of conveyance whatsoever," and that the company should "not be responsible for any injury or damage, however caused." And though the jury found that the loss of the horse arose from "gross negligence," the Court of Exchequer felt itself compelled, upon the true and proper meaning of the words, to decide in favour of the defendants. In that case, Mr. Baron Parke, in delivering judgment, observed, with reference to the argument on the inconvenience arising from such contracts, that that "was not matter for the interference of the Court, but must be left to the Legislature, who might, if they pleased," \*558 put a stop to this \* mode which the carriers had adopted of limiting their liability.

The Legislature did interfere. In a very short time after the decision in *Carr v. The Lancashire and Yorkshire Railway Company* was pronounced, the Act of Parliament was passed upon which the present question arises. It cannot be doubted, that the object of the Legislature in passing it was to prevent these contracts, in which liability for negligence is either entirely excluded, or made conditional on the payment of a premium. However vast may be the advantages which railway communication affords, the complete monopoly of the carrying business of the country which the railway system necessarily involves, rendered legislative interference requisite to protect those who have goods to be carried, against unjust and unreasonable terms.

There are some things, no doubt, and it is to these that the 1st proviso of the section is directed, in respect of which, reference being had to the increased risk arising from railway conveyance, it may be reasonable that railway companies should be at liberty to impose terms with a view to prevent the possible negligence of their servants, or to diminish the mischief that may result from it.

<sup>1</sup> 7 Exch. 707.

Thus, it may be just and reasonable that railway carriers should be correctly informed of the nature and character of the goods they are called upon to convey, so that increased vigilance and care may be applied when called for by the nature, or the higher value of the articles. So, again, reference being had to the uncertainties of railway conveyance, and the fluctuations of traffic on an extended line of railway, it might be thought reasonable that railway carriers should be at liberty to stipulate not to be answerable for delay arising from unforeseen causes. Other instances might be adduced, in which, with a view \* to the \* 559 safer and more convenient working of railway traffic, it might be reasonable that conditions should be imposed on the customer. But to say, save in the peculiar and exceptional cases provided for by special legislation, that it is reasonable that companies which undertake to carry goods may insist on an absolute and unqualified freedom from all liability in respect of negligence, or, in addition to the ordinary rate of charge, may exact a premium to insure protection to the goods owner against their own negligence, appears to me, I must say, a proposition altogether untenable.

It is unnecessary to consider how far, if a company established a twofold rate of charge, a higher and a lower, and gave the customer the option of paying less than the ordinary freight, on the condition of taking all risk upon himself, such a proceeding would be reasonable. That case is not before your Lordships. There is nothing here to show that the freight paid by the plaintiff was not the full rate of charge payable on commodities of this class. And the doctrine contended for goes the length of asserting for the carrier a right to throw the entire risk on the owner, without even affording him the option of obtaining insurance by the payment of a premium.

A further reason for preventing railway companies from too easily divesting themselves of responsibility for negligence is to be found in the fact with which every day's experience unhappily makes us familiar, that loss or injury too frequently arises from the negligence of some of the numerous servants whom railway companies are under the necessity of employing. It is only by the utmost vigilance on the part of those to whom the management of railway affairs is committed, that this evil can be kept at its lowest point. And the effect of sanctioning

\* 560 \* such a condition as the present, will obviously be either to compel those who have goods to be conveyed to submit to undue exaction, or, in the event of their refusing to pay the required premium, to deprive them of the protection which the interest of the railway companies in preventing negligence on the part of their servants would otherwise secure to them.

It is scarcely necessary to observe that this Act leaves railway carriers wholly unfettered in taking measures to exclude the liability in respect of inevitable accident, which the law of England, perhaps with undue rigour, casts upon them. The Act deals only with the matter of negligence, which the carrier has the means and opportunity of guarding against, which the owner of the goods, who has necessarily parted with the custody of them, has not. In the relative position of the parties, it is right as well as expedient that the carrier shall be prevented from too easily divesting himself of the obligation to apply the diligence and care which can alone insure the safety of the thing intrusted to him.

Independently of this general reasoning, there are two special grounds on which it appears to me that such a condition as the present cannot be upheld. In the first place, it is to be observed that in this contract, as indeed in all the others of a like character which have come under discussion, no exception is made in respect of loss or injury arising from felonious acts by the company's servants. But the Legislature, in giving the carrier the large protection afforded by the Carriers' Act, thought it right to make a special exception in this particular. We have here, it seems to me, a statutory exposition of the degree of protection which the Legislature has thought should, under special circumstances, be

afforded to the carrier. The present stipulation goes further,  
 \* 561 and if not \* bad on general grounds, as I undoubtedly think it is, must, I conceive, be held bad on this. Again, it should be borne in mind that the Carriers' Act had reference to cases in which the carrier was at liberty to fix his own rate of charge, whereas railway companies, by the Acts by which they are constituted or regulated, are limited to fixed and specified rates. But if the principle upon which the present condition is contended for be good, it would be competent to railway companies to super-add to the maximum rate allowed by their Acts, an extra sum for insurance. I cannot think that, where no such power is given by special enactment, this can be a reasonable proceeding. Being for

these reasons clearly of opinion that this condition is unreasonable, it follows as a necessary consequence, that in my opinion the plaintiff is entitled to judgment on the 5th plea.

The question on the 4th plea remains to be disposed of. As to this, I am inclined to concur with the majority of the Court of Exchequer Chamber in thinking that the correspondence between the parties amounted in effect to a signed contract; but I am nevertheless of opinion that the plaintiff is entitled to judgment. The judgment of the Court of Exchequer Chamber, if I understand it rightly, is based on the assumption that, provided there be a special contract signed between the parties, the leading enactment of the 7th section, whereby a condition for immunity in respect of negligence, unless reasonable, is rendered inoperative, no longer applies. This position appears to me to be altogether unwarranted. In the first place, it assumes that the last proviso but one in section 7 is a substantive enactment; whereas to my mind it is quite plain that this proviso is itself only a proviso on the 1st proviso of the section. In the second place, it assumes, I think quite as unwarrantably, that this penultimate proviso \* authorises a condition for immunity in respect of \* 562 negligence in a signed contract; thereby converting a disabling provision into an enabling one, a negative provision into an affirmative one, reading the enactment that no special contract shall be binding unless signed by the party, as though it were written, "A special contract, if signed by the party, may contain a condition for non-liability in respect of negligence," a reading which, as it seems to me, cannot be justified upon any sound canon of construction. Moreover this reasoning obviously involves this startling consequence. It ascribes to the Legislature the singular inconsistency of sanctioning as just and reasonable in a written contract that which it prohibits as unjust and unreasonable in a verbal one. For it is quite plain that the leading enactment of section 7 has reference to actual contracts. Not only is the word "condition" inconsistent with any thing other than an actual contract, but the enactment itself, except in the case of an actual contract, would have been wholly superfluous and uncalled for. For, long before the passing of this Act, the law had been settled that no notice or declaration on the part of a carrier would have the effect of limiting his liability, unless it were shown to have been brought to the knowledge of the other party, so as to afford

proof of a contract between them on the terms of the declaration or notice. And of course such a contract would be a special one, as departing from the ordinary terms which the law implies in a bailment of this nature.

It is plain, therefore, that the leading enactment of section 7 has reference to special contracts. And this being so, what possible ground can be suggested for supposing that the Legislature intended to permit terms in a written contract, of which it \* 563 prohibited the introduction \* in a parol one? Unless, indeed, it should be said that that which is unjust and unreasonable in the one form of contract becomes just and reasonable in the other. But, independently of this absurdity, the circumstances under which this Act was passed show plainly that it never could have been the intention of Parliament to apply the restriction on conditions in respect of negligence to verbal contracts alone. The cases in the Courts of law to which I have before referred, down to *Carr v. The Lancashire and Yorkshire Railway Company* (which case led to an appeal to the Legislature, and so to the present statute), were all cases in which there had been a written special contract, signed by the parties. Yet, as I have already said, it was these very cases which led to the Statute which is now under consideration. Nor could it have escaped the attention of the Legislature, any more than it will that of your Lordships, that if it were open to railway companies to render a condition of this kind effectual by making it part of a signed contract, the 7th section of this Act would at once become a dead letter. The owner of goods who desires to send them by railway, being, as I have before pointed out, in the power of the railway carrier, has no more option as to signing a printed or written paper than he has as to accepting a ticket; and we know that, in practice, railway companies which seek to establish such conditions insist on having the signature of the customer to their terms. A further inconvenience which would arise from reading the proviso in question as a substantive enactment, instead of as a qualification of the 1st proviso, is that it would then embrace all special contracts whereby railway companies sought to limit their common-law liability as insurers. Yet it is plain that the section never was intended to apply to the latter contracts, or to \* 564 \*fetter the power of the companies to limit their liability otherwise than in respect of negligence.

On the other hand, if the penultimate proviso of the section be read, as it seems to me it should be read, as being itself a proviso on the first, none of these anomalies and inconveniences arises, and the section with its provisoes becomes a consistent and intelligible whole. We have first the leading enactment of the section with its first proviso, rendering in general terms stipulations for non-liability in case of neglect in contracts (whether verbal or written) inoperative, unless they be such as a Court or Judge shall deem just and reasonable; after which we have the further provision that contracts into which such stipulations are introduced) and which thereby necessarily become special contracts) shall still not be binding, unless signed by the parties to be affected by them. A reason for which latter provision is readily to be found in the fact that conditions of this nature, being often printed in small characters on the back of receipts and tickets, might easily be overlooked by parties delivering goods at railway stations; whence injustice, or at all events undesirable litigation, might frequently arise. I see nothing in the language of the proviso inconsistent with the view I have here suggested. On the contrary, referring to "special contracts respecting the receiving, forwarding, and delivering of goods or things as aforesaid," it may fairly be taken to relate to the special contracts referred to in the earlier part of the section. It is true this proviso is separated from the one with which I would connect it by two other provisoes; but these, like itself, are also provisoes on the first proviso, and, as they too relate to special contracts, the succeeding proviso, the one now under consideration, would apply to them also. There can be no doubt that \* this statute is singularly ill drawn and con- \* 565 fused, but the view I take of it appears to me to be not only a reasonable one, but the only one by which the protection which the Legislature intended to afford to the public can be insured.

If the view I take of this proviso be the right one, it follows that the plaintiff is entitled to judgment on the 4th plea. The plea would be bad as not setting forth this condition, and averring it to be just and reasonable; or, if it had contained such an averment, the defendants must, on the hypothesis on which this part of the case stands, have been defeated on the fact.

In conclusion, I must observe that I should have had greater hesitation in expressing so decided an opinion in opposition to that of the Court of Exchequer Chamber in this case, were it not that



the view I have the honour to submit to your Lordships is in precise conformity with the judgment of the Court of Exchequer Chamber in the prior case of *M<sup>r</sup> Manus v. The Lancashire and Yorkshire Railway Company*.<sup>1</sup> In that case a paper containing the conditions had been signed, and the same point, therefore, as it appears to me, arose as presents itself in the present case. I should have conceived that such prior decision would have been binding until reversed by your Lordships. In this conflict of authority, I can only say that, in my humble judgment, the earlier decision was the sounder and better one, and I shall continue so to think unless your Lordships shall be pleased otherwise to decide.

For these reasons, I answer the first question put by your Lordships in the negative, and the second and third in the affirmative.

\* 566    \* THE LORD CHANCELLOR (LORD WESTBURY.) — My Lords, this is a question of great interest to the community at large, and of special importance to the railway companies. We are much indebted to the learned judges for the elaborate opinions which they have given in this case. I regret that those opinions are much at variance with one another. I attribute that difference of opinion to the conflicting decisions upon this subject; but, with deference, I cannot believe that there is in the matter itself any very serious difficulty.

The question depends almost entirely upon the construction to be given to the 7th section of the Railway and Canal Traffic Act, passed in the year 1854. My Lords, I concur entirely with the interpretation put upon that section by Lord Chief Justice Jervis in the case of *Simons v. The Great Western Railway Company*.<sup>2</sup> I think that the true construction of that section may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common-law liability of the companies as carriers. Such common-law liability may be limited by such conditions as the Court or Judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person.

<sup>1</sup> 4 H. & N. 327.

<sup>2</sup> 18 C. B. 805, 829.

It is true that the section is expressed in a confused manner, but those conclusions, I think, are plainly deducible \* from \* 567 the cumbrous language which is there employed.

The first point, therefore, which arises in the present case is this: Is the condition on which the company in the present appeal rests its defence a just and reasonable condition?

It is important, in the first place, to observe, that not only does the section of the Act of Parliament to which I have referred declare that the general conditions shall be invalid so far as they seek to affect the common-law liability of railway companies as carriers, but the words expressly state that any condition having for its object to relieve a company from liability occasioned by the neglect or default of such company shall be null and void. Now if the present condition had been embodied in a contract between the company and the owner of the goods delivered to be carried by that company, the necessary effect of such a contract would be, that it would exempt the company from responsibility for injury, however caused, including therefore gross negligence and even fraud or dishonesty on the part of the servants of the company. For the condition is expressed without any limitation or exception.

I am therefore, in the first place, clearly of opinion, that the condition insisted upon by the company, even if it had been duly embodied in a special contract between the parties to this appeal, is a condition which it would have been the duty of a Court or Judge to hold to be neither just nor reasonable.

The effect, therefore, of this view of the case would be, that the plaintiff Peek, in the Court below, would be entitled to a verdict upon the 5th plea, for the 5th plea depends entirely upon the averment that the condition was just and reasonable.

\* But, my Lords, it is not only necessary that the condi- \* 568 tion should be just and reasonable, but it is also necessary, as I have already observed, that it should be embodied in a special contract in writing, signed by the owner of the goods, or the person delivering the goods. And the second question that arises (although in truth the first point would dispose of the whole case), is whether there does exist in this case any special contract in writing, embodying the condition, signed by the owner of the goods, or the person delivering the goods. It is insisted by the plaintiff that that requisition of the statute is answered and fulfilled by the letter of the 1st of August, 1857; it is contended by

the company that the words which are found in that letter, "not insured," do refer to and incorporate the condition. I am clearly of opinion, that there is no foundation for that contention on their part, and I am also of opinion that it is not competent, by any description or parol evidence, so to interpret the words "not insured," as to embody or incorporate the condition itself into the letter, and thereby make it a special contract in writing. Such special contract in writing, signed by the party delivering the goods, must itself, either in terms or by distinct reference, set out or embody the condition in question. But I am of opinion, that those words "not insured" do not refer to the written condition, or afford any ground upon which the written condition can be regarded as incorporated with the letter. In order to embody in the letter any other document, or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing that by force of the reference the writing itself becomes part of the instrument it refers to.

\* 569 \* I am, therefore, of opinion that even if the condition had been just and reasonable, there would not be found in the present case any special contract in writing sufficient to answer the exigency of the 7th section; and I should therefore have been of opinion that, in the Court below, the plaintiff Peek was entitled to a verdict on the 4th plea. On every ground, therefore, my Lords, I humbly submit to your Lordships that the judgment of the Court of Exchequer Chamber is wrong, and that the plaintiff is entitled to a verdict upon the 4th and 5th pleas in the action.

LORD CRANWORTH. — My Lords, the question to be decided by your Lordships on this appeal is, whether on the issues joined on the 4th and 5th pleas, the verdict ought (considering the enactments of the Carriers' Act, and of the Railway and Canal Traffic Act), to be entered for the plaintiff or the defendants.

The 4th plea is to the following effect: [His Lordship read it, see *ante*, p. 474.]

By the Carriers' Act, 11 Geo. 4, and 1 Wm. 4, c. 68, various enactments were made regulating the rights and duties of carriers in reference to goods delivered to them to be carried. And the

6th section provides that nothing in the Act contained should extend to annul or affect any special contract between the carrier and other parties for the conveyance of goods.

Then came the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, on the 7th section of which the present question arises. [His Lordship read it, see *ante*, p. 474 n.]

The special contract referred to in this proviso must, I think, be a contract similar to that which, by the 6th section of the 11 Geo. 4, and 1 Wm. 4, c. 68, is excepted \* from the \* 570 general operation of that Act, the only difference being that, by the express provision of the later Act, every such special contract must be signed by the party delivering the goods.

The question on the 4th plea is, whether there was such a contract in writing, signed by the plaintiff or his agent, agreeing that the goods in question should be carried on the terms stated in the plea, i. e. that the company should not be responsible for injury to them, unless declared and insured according to their value.

The only document which can be contended to be a document answering this description, is the letter of the 1st of August, 1857. This letter may be taken to be a document signed by the person delivering the goods; but unless it is apparent on the face of it that the person signing it thereby agreed that the company should not be responsible for injury to the goods, unless they were insured according to their value, it is not a contract which sustains the plea. I think it is wholly insufficient for this purpose. It shows that the person sending the goods chose to send them with the incidents attaching by law to the sending of them uninsured; but it does not show that he agreed to a stipulation by the defendants, that they were to be absolved from responsibility by reason of the goods being so sent; still less that he so agreed by reason of their not being insured according to their value. Even if it could be held that there is a well-recognised distinction in the carrying trade between the extent of liability in the carriage of goods where they are insured and where they are uninsured, it by no means follows that insurance must necessarily be according to the value of the goods. It might be by doubling or trebling the ordinary rate of charge, without reference to the value of the goods to be carried.

\* It is not necessary to consider whether there was not in \* 571 this case what would, independently of the statute requir-

ing a signed contract, have amounted to a valid contract absolving the defendants from responsibility in consideration of their demanding only the lower rate of 55s. per ton for the goods carried. Looking to all which had previously passed between the plaintiff's agent and the defendants, the jury might perhaps reasonably come to the conclusion that such a contract had been proved ; but that would not be a special contract in writing, such as is required by the statute. There is no written document signed by the person delivering the goods, either stating the terms on which, according to the 4th plea, the marbles were to be carried, or referring to any other document which on general principles of law could be referred to, and which would prove those terms. On these grounds, I think the verdict ought to be entered for the plaintiff on the 4th plea.

I am further of opinion that on the 5th plea also, the verdict should be entered for the plaintiff. That plea is as follows: [His Lordship read it, see *ante*, p. 475.]

The evidence may be taken to show that the marbles were delivered by the plaintiff to the defendants, subject to the condition that the defendants would not be responsible for any injury to them, unless, in addition to the ordinary charge of 55s. per ton, the plaintiff would pay, by way of insurance, ten per cent. on their value. By the express terms of the statute no such condition is valid unless the Judge is satisfied that it is a just and reasonable condition. I do not think that there is anything appearing on the special case which ought to have satisfied the Judge, or by consequence, which now ought to satisfy your Lordships, that this was such a condition. For this purpose, I think it was incum-

\*572 bent on the defendants \* to show by evidence, not only that marbles were subject to more than ordinary risk when carried by railway, but further, that ten per cent. on their value was no more than a fair compensation to the carrier for that additional risk. Whether there is or is not more than ordinary risk in the carriage of marbles, is a question not of law but of fact, and as to which, therefore, a Judge cannot have any judicial knowledge. I own it is a surprise to me to learn, as a matter of fact, that it is so. It is according to the every-day experience of all of us, that goods of a much more fragile nature than marbles, such for instance as glass and china, when properly packed, are sent great distances both by railway and by sea, transferred often from a rail-

way to a ship, and thence again to a railway, and yet that they usually reach their destination without injury. This of course has no bearing on the present question, except so far as it shows that there ought to have been evidence on the point. But even if it had been shown that there is more than ordinary risk in the conveyance of marbles, still I think the defendants were bound to show further, that ten per cent. on the value was no more than a reasonable extra charge. If the defendants are right in their contention, they could have had no difficulty in establishing all which (if uncontradicted) would be necessary; some of their own servants would probably have been able to depose to the fact of additional risk; and if it was shown that ten per cent. is the usual extra charge, that, if uncontradicted, would probably have been all which the Judge would have required. But in the absence of any evidence, I cannot think that the Judge was warranted in holding that the condition was just and reasonable. The onus of proof, it will be observed, is on the company. The plaintiff was not bound to show that the condition was unjust or unreasonable.

\* Even, however, if it had been shown that an extra \*573 charge of ten per cent. on their value was no more than was reasonable by reason of extra risk, still I think that the 5th plea was not proved, for I do not think that the plaintiff assented to the condition in the sense in which such assent would be understood after verdict; i. e., I do not think that he agreed that the goods should be carried by the defendants on the terms that they should be absolved from all liability by reason of there being no insurance. The fair interpretation of what passed was, in my opinion, that the plaintiff sent the goods desiring the defendants to take them with such liabilities only as attached to them as carriers of goods uninsured. The plaintiff had full notice of the condition imposed by the defendants, but I do not interpret what he said or did as implying that he agreed to send the goods on the terms embodied in that condition, but only that having notice of its terms, he did not choose to purchase, on the terms offered, the extra security which would be afforded by insurance.

I have not, in the few observations which I have offered to your Lordships, adverted specially to the opinion of the learned Judges who assisted the House, but this is not because I do not feel how valuable that assistance has been. They have differed in the opin-

ions which they have delivered here, as they did in the Courts below, but, thus differing, they have presented the question in every point of view, and it is mainly on an attentive consideration of their arguments, that I have formed the opinion with which I have troubled your Lordships.

LORD WENSLEYDALE. — My Lords, I am sure your Lordships are greatly indebted to the learned Judges for the extraordinary  
 \* 574 pains \* they have taken in considering the questions left to them, and the full and able opinions which they have given to your Lordships. We have to endeavour to discover the intentions of the Legislature, in a clause which is far from clearly expressed, and was probably drawn by more than one person.

I have satisfied myself, however, after full consideration of the very learned and careful opinions which we have heard, that I ought to concur with the majority of the learned Judges who have given their advice, and that the judgment of the Exchequer Chamber ought to be reversed.

The questions proposed to the Judges were these : [His Lordship read them, see *ante*, p. 490.]

The conclusion to which I have come is, that the first question ought to be answered in the negative, and the second and third in the affirmative.

Mr. Justice Blackburn, in his very able and clear opinion, has fully stated and explained most of the various decisions which have taken place as to the liability of carriers. At one time, in this country, it was thought by some that notices given by carriers of the conditions on which they would carry, operated as restrictions of the public character of a carrier, according to which only he was bound to carry, and not as being evidence of a special contract. By others it was treated as evidence of a special contract. Since the Carriers' Act, 11 Geo. 4, and 1 Wm. 4, c. 68, there was no longer a question on this subject.

The first section of that Act expressly provides that no public notice or declaration should be deemed or construed to limit, or otherwise affect, the liability of public common carriers, and that such carriers should be liable, at common law, to answer for  
 \* 575 the loss of, or injury to, \* any articles in respect whereof they may not be entitled to the protection of the Act, any public notice made by them, and given contrary thereto, or any-

wise limiting such liability notwithstanding ; but a subsequent section (6) provided that nothing in the Act contained should annul, or in any wise affect, any special contract between such common carrier, or any other parties for the carriage of goods.

Numerous subsequent cases between the years 1832 and 1854, established that a carrier might make a contract by notice limiting his responsibility, even in cases of gross negligence or misconduct. At length, such having become frequent, it was suggested in the case of *Carr v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> that if any inconvenience should arise from such contracts being entered into, it was not matter for the interference of Courts, but that it must be left to the Legislature, which might, if it pleased, put a stop to this mode which the carriers had adopted to limit their liability.

The Legislature, apparently, answered that appeal by passing "The Railway and Canal Traffic Act, 1854" (17 & 18 Vict. c. 31), and the sole question is, what is the construction to be put upon that ill-penned Act? The terms of the 7th section of the Act are these [His Lordship read the first part, see *ante*, p. 474]. Then it is provided that no greater damages should be recovered in the case of animals than those mentioned in the Act. And then, at the end of the section, there is this proviso, requiring every specific contract to be signed by the person delivering animals, articles, goods, or things for carriage.

I have considered these terms fully, and I have satisfied \*myself that the Legislature meant to allow carriers to \*576 limit their responsibility by reasonable conditions, but that a Judge in an ordinary trial, or possibly the Court on a trial at bar, should determine whether those conditions were reasonable or not, subject to the control of the Court above. The provision that the company may make conditions, if thought reasonable by the Judge or Court, comes by way of qualification of the general prohibition exempting companies from losses arising from their own neglect or default, or that of their servants. It means, that notwithstanding that general prohibition, they may make a fair bargain for their remuneration, such bargain being sanctioned by the Judge or Court. When the peculiar condition is sanctioned by the Judge and the Court, in case of appeal, as reasonable, the previous prohibition is done away with.

<sup>1</sup> 7 Exch. 707.



But it was also intended, that no special contract should be binding unless signed by the party sending or delivering goods to the carriers. It is, however, impossible to suppose that the Legislature meant that such an express written contract should contain any species of conditions on which the parties could agree, whether unreasonable or not, which they could not impose where the contract was implied. It seems to me that it was intended that every special contract for carriage, i. e. subject to any other than the common-law liabilities of the carrier, should be a contract in writing, and signed as mentioned, and should contain reasonable conditions.

I agree, therefore, entirely with the view of this statute entertained by Chief Justice Jervis, in *Simons v. Great Western Railway Company*,<sup>1</sup> and expressed in very clear and intelligible terms.

[His Lordship read it, see *ante*, p. 483.]

\* 577 \* This being, as I think, the true construction of the statute, we have then to decide the three questions which your Lordships have put to the Judges.

The first question is, whether the condition is a just and reasonable condition, within the true intent and meaning of the 17 & 18 Vict. c. 31? And connected with that is the third question: Is the plaintiff entitled to have the verdict entered for him on the 5th plea, which states that the goods were carried on a just and reasonable condition, made by the defendants, and assented to by the plaintiff, that the defendants should not be responsible for loss or injury to marbles, unless declared and insured according to value, and that the goods were marbles, and were not insured?

What then is the meaning of the alleged condition? Does it mean to protect the company from all liability, however occasioned? Or, is there an implied exception of the default or neglect of the company, or its servants?

I think it impossible to give this construction to the alleged condition, for the condition is pleaded in bar to the whole cause of action. The condition must be proved to apply to loss or damage of every kind, in order to sustain the plea. To be a good plea in the limited sense, it should have been pleaded in bar to all, except to that part of the damage which was caused by the neglect or default of the company and its servants; probably the principal part of the damage sustained. As the plea is pleaded, it is unquestionably meant as an answer to the whole damage sustained.

<sup>1</sup> 18 C. B. 805, 829.

In that sense, it is quite clear that the condition was unreasonable.

As such marbles are liable, more than many other goods, \*to be damaged by breakage or damp, and to require \*578 greater and more constant care to protect them from that damage, in the course of their transit to the place of destination, and the damage when done is generally more serious, I think it would be perfectly fair and reasonable to ask an increase of the rate of remuneration above that of ordinary goods; and if the notice had stipulated that the defendants would not carry marbles, &c. at the ordinary rate for goods, but should require a larger compensation to be agreed upon, or a specified or fixed sum, being apparently reasonable, I do not doubt that such a condition would have been perfectly reasonable within the meaning of the Act. I need not inquire whether the offer of an alternative rate, as some of the Judges have suggested, might be reasonable also. But I am clearly of opinion, that it is not reasonable for a carrier to say I will not be liable as a carrier at all for neglect, or any other injury, in the course of the carriage of the goods delivered to me, unless I receive a price for insuring the goods against all possible loss. I will not be responsible for any loss, unless you pay me a fixed sum for indemnifying you against all.

I must add, with reference to this part of the case, that if my reasoning above stated is correct, the plea that there was a condition, simply, is a bad plea, therefore the verdict ought to be entered for the plaintiff, for under the Act a special contract would be necessary to exempt the company from responsibility.

The next question is, Is the plaintiff entitled to have the verdict entered for him upon the 4th plea?

The 4th plea is that the goods were carried on the terms of a special contract, signed by the parties delivering, whereby it was agreed that the defendants \*should not be responsible \*579 for the loss or injury to marbles, unless declared and insured according to their value; and the goods were marbles, and not insured.

I am clearly of opinion that the plaintiff was so entitled, for it is perfectly clear that no special contract at all was entered into; certainly no such a special contract as I think the statute requires, that is, a contract for the receiving, carrying, or delivery of these goods, signed by the plaintiff or the party delivering such goods

for carriage. There was no contract, in truth, for the carriage of the marbles on any special terms. The correspondence between Mr. Corden and Mr. Meigh about sending these marbles ultimately comes to this : that they were to be sent without any special terms at all, but were delivered in the ordinary way to the defendants as carriers, subject to their ordinary liabilities as such.

The 5th plea is that the goods were carried subject to a just and reasonable condition, made by the defendants and assented to by the plaintiff, that the defendants should not be responsible for the loss or injury to the marbles unless declared and insured according to their value, and that the goods were marbles, and were not insured.

In answering the former questions I have already given my reasons for saying that this plea is not proved.

I think, therefore, that the judgment ought to be reversed.

LORD CHELMSFORD. — My Lords, I have the misfortune to differ with all my noble and learned friends who were present at the hearing of the appeal. When I found that this was likely to be the case, I thought it right to reconsider carefully the grounds of the opinion which I had formed, in order to discover the error into which I was satisfied I must have fallen. But though I \* 580 have sought for reasons I have not \* been able to find any which are sufficiently satisfactory to my own mind to lead me to adopt the conclusions at which my noble and learned friends have arrived. My only consolation is, that if I err in judgment in this case my error is countenanced by many Judges of great learning and ability.

At the outset of this inquiry the question arises whether your Lordships concur in the opinion of Lord Chief Justice Jervis and the Court of Common Pleas, in *Simons v. Great Western Company*, and *The London and Northwestern Railway Company v. Dunham*,<sup>1</sup> and the judgment of the Court of Exchequer Chamber in *M. Manus v. Lancashire and Yorkshire Railway Company*,<sup>2</sup> decided after the judgment of the Queen's Bench in the present case, but before the argument in the Exchequer Chamber, where the counsel for the company was compelled to abandon the 5th plea in consequence of that decision. If those two cases were rightly decided the judgment of the Exchequer Chamber under consideration cannot be

<sup>1</sup> 18 C. B. 829.

<sup>2</sup> 4 H. & N. 327.

supported. In the case decided in the Common Pleas, Lord Chief Justice Jervis, in summing up his examination of the Statute of 17 & 18 Vict. c. 31, said: "The result seems to be this: a general notice is void, but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the Legislature have thought fit to impose the further security that the Court shall see that the condition or special contract is just and reasonable." In *M<sup>c</sup>Manus v. Lancashire and Yorkshire Railway Company*, the same view of the statute was taken, the Exchequer Chamber in effect deciding that there was no \* difference between notices, conditions, or declarations \* 581 made and given by a railway company and special contracts entered into with them; but that all, without distinction, must be signed, and must be such as the Judge, before whom any question relating to them may be tried, shall adjudge to be just and reasonable.

In two prior cases, *Wise v. The Great Western Railway Company*<sup>1</sup> and *Pardington v. South Wales Railway Company*,<sup>2</sup> the Judges of the Court of Exchequer appeared to consider the provisions in the statute as to notices and conditions to be distinct from those relating to special contracts.

In order to determine the correct interpretation of the Act, it is necessary to consider shortly the previous state of the law. Before the passing of the Carriers' Act, 11 Geo. 4, and 1 Wm. 4, c. 68, carriers had been in the habit for a long course of years of protecting themselves against their extensive common-law liability by means of general notices. These notices afforded them no protection unless they were brought home to the knowledge of the customer; but when so known they entered into and formed part of the terms upon which the goods were to be carried in each particular case. But besides these notices, upon the mere knowledge of which the terms of carriage were fixed between the parties, it was always open to the carrier and the owner of goods to enter into special agreements with respect to their carriage.

This distinction between notices and agreements is recognised by the Carriers' Act; for, while it excludes the liability of carriers for the loss of certain goods above the value of 10*l.* except upon

<sup>1</sup> 1 H. & N. 63.

<sup>2</sup> 1 H. & N. 392.

certain terms, and prevents the limitation of their liability \* 582 for any other goods \* by any public notice or declaration, it provides that nothing in the Act contained shall annul or in any way affect any special contract for the conveyance of goods and merchandises. After the passing of this Act, although carriers could no longer limit their liability by a general notice, yet it was held in several cases, amongst which it will be sufficient to mention *Carr v. Lancashire and Yorkshire Railway Company*,<sup>1</sup> and *Austin v. Manchester, &c. Railway Company*,<sup>2</sup> that a notice expressing the terms on which goods would be carried, delivered to the owner of the goods, and assented to by him, amounted to a special contract, which might exempt the carrier from liability even for negligence.

It was after these decisions, and in all probability in consequence of them, that the provisions in question were inserted in the 17 & 18 Vict. c. 31. That Act, in the last proviso of the 7th section, provides that nothing therein contained shall alter or affect the rights, privileges, or liabilities of any company under the 11 Geo. 4, and 1 Wm. 4, c. 68. Therefore the limitation of the carrier's liability as to certain description of goods, the prohibition against general notices, and the right to make special contracts, were all continued. The Legislature, by the 7th section of the Act, evidently intended with reference to what had been previously enacted by the Legislature and decided by the Courts, to place the relation between railway and canal companies and their customers, upon a more reasonable footing for the future.

To guard, therefore, against the unreasonableness of companies being allowed to protect themselves from responsibility for negligence, it enacts in the first place that companies should be \* 583 liable for any loss or injury occasioned \* by the neglect or default of themselves or of their servants, notwithstanding any notice, condition, or declaration made and given by them contrary thereto, and it declares "every such notice, condition, or declaration to be null and void." Having thus protected the public by preventing the companies relieving themselves from liability for negligence by a notice, condition, or declaration, the section proceeds to provide for the case of conditions imposed by companies upon the receiving, forwarding, and delivering of goods; and having an eye to the decisions which had determined that a notice de-

<sup>1</sup> 7 Exch. 707.<sup>2</sup> 10 C. B. 454.

livered to the owner of goods, and assented to by him, amounted to a contract as to the terms of carriage, and knowing that the assent which is supposed to be given at the time of the delivery of the goods, is often without any actual knowledge of the conditions contained in the delivery ticket, it provides that only such conditions shall be made (that is, shall enter into the terms of the contract), "as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable." The section having thus provided fully against limitation of liability by notices or conditions (which are evidently used as synonymous expressions), in one case absolutely prohibiting them, in the other submitting their reasonableness to the judgment of the Judge, provides, by one of its many provisoes, that no special contract between such company and any other parties, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage.

I have no doubt (and here I have the concurrence of my noble and learned friend Lord Cranworth) that the special contract intended by this proviso is the same description \* of \*584 contract which is mentioned in the 6th section of the 11 Geo. 4, and 1 Wm. 4, c. 68 (which Act by the very next proviso in this 7th section is to be in force), with this additional provision, that the special contract shall not be binding unless signed. I suppose it may be assumed that under the 11 Geo. 4, and 1 Wm. 4, the carriers were at liberty to make special contracts with the owners of goods upon any terms of carriage that might be mutually arranged between them. If so, and the special contracts contemplated in the two Acts are of the same description, what is there in the 7th section of the latter Act to deprive the parties of their liberty to agree upon their own terms, unless a Court or Judge shall adjudge them not to be just and reasonable?

The appellant contends for a construction of this rather complicated and involved section, which would leave no distinction between notices, conditions, or declarations, and special contracts, but would require that notices, &c. should be signed, and that special contracts should, in the opinion of the Judge, be just and reasonable. I cannot accede to this interpretation of the section. I find a marked distinction in terms between the two species of engagements, and I must suppose that the Legislature intended

something different by their difference of language. Nor can I perceive any thing unreasonable in supposing that the Legislature meant to apply a different rule to notices and to special contracts. It might be very inconvenient, when goods are to be sent by railway, if the terms on which they are to be carried are ordinary and reasonable, to require that a contract should be signed upon each occasion, the owner of the goods being sufficiently protected against any surprise, or the imposition of hard terms by interposing the judgment of the Judge as to their unreasonableness.

\* 585 \* But it is quite a new principle that parties are to be debarred from making contracts for themselves, not being contrary to law, nor to public policy, because the uncertain opinion of some Judge who accidentally has to try any question relating to them should adjudge them not to be just and reasonable. I venture to think that the best test of the reasonableness of the contract is not the occasional opinion of the Judge who happens to preside in Court when the contract is in question, but of the parties who have deliberately chosen to enter into it.

Why, if owners are willing, upon terms which they consider advantageous to themselves, to undertake the risk of all goods sent by railway, even including the negligence of servants of the company, and agree with the company to bind one another by a special contract duly signed to that effect, should a Judge be invested with authority to say, Whatever you may think, I consider your contract not just and reasonable, and however willing you may be to be bound, I release you from your engagement.

I am of course not intending to deny the power of the Legislature to impose any restrictions, however unreasonable, upon contracts; but I am insisting upon the unreasonableness as a ground for adopting a different construction of the Act, if the words are fairly capable of it. Now it appears to me that the 7th section is not only capable of, but demands a different construction from that which is contended for by the appellant, not only from the change of expression in the different provisoes of the section, but also from the difference of the subjects to which each part of it is applicable. The former part is confined to notices or conditions (treating these as the same), and providing for them in every case, by declaring a certain class of them to be null and

\* 586 void, \* and all of them to be subject to the approval of a Judge. The latter deals with "special contracts" (a de-

scription made familiar to the Legislature by the Act of 11 Geo. 4, and 1 Wm. 4, c. 68, which was before it when it was framing this 7th section of the latter), and does not prohibit such contracts from containing terms at variance with the provisions respecting notices ; but merely provides that they shall not be binding unless they are signed.

I think, therefore, that where a special contract is entered into and duly signed between a railway company and other parties within this section, it is not subject to any judicial discretion as to whether it is just and reasonable in its character or not.

I think that the condition that the defendants should not be responsible for the loss or injury to marbles unless declared and insured according to their value, is a just and reasonable condition. In this respect also I concur with my noble and learned friend, Lord Cranworth. Of course if the condition means that the defendants were to be exempt from responsibility for the neglect and default of themselves or of their servants, it would be null and void, by the express words of the Act. But this interpretation would be contrary to what must have been the understanding of the parties. It must be assumed in considering this question that the plaintiff assented to this condition, and that his goods were to be carried on the terms which it contained.

Now, both parties must be taken to have known the Act of Parliament, and could not be supposed to have agreed upon conditions of carriage of the goods which the Act expressly declares shall be null and void. The words of the condition therefore must have been understood by both parties, and ought reasonably to be construed \*as if there had been an ex- \*587 ception of the default or neglect of the defendants or their servants, which exception I think the Act itself would engraft upon the condition. And with this reasonable (not to say necessary) limitation of the generality of its terms, the condition appears to be unobjectionable.

I think that the special contract alleged in the 4th plea was established by the evidence, and that the defendants were entitled to the verdict upon that plea. The letter of the 1st August, 1857, directs the defendants to forward the cases of marble, "not insured." Those words are not self-interpreting, but require some explanation to ascertain their particular meaning between the parties. I think that the previous correspondence might be resorted



to to furnish this explanation, although the letter in question contains no reference to it. It seems to me to fall exactly within the principle stated with so much clearness by Sir James Wigram in his admirable treatise, as it is "evidence which is ancillary only to a right understanding of the words to which it is applied, and which is simply explanatory of the words themselves," and not "evidence which is applied to prove intention itself as an independent fact." The intention is clear, that the goods shall be carried "uninsured." What this means is explained by the notices which were delivered to Mr. Meigh, containing the condition as to the responsibility of the defendants, upon the footing of which all the subsequent correspondence proceeded. The correspondence cannot be used as a part of the agreement, as there is no reference to it in the letter which accompanied the delivery of the goods, but that letter constitutes the agreement, and with the explanatory aid of the correspondence, is rendered complete in itself.

It will be collected from what I have already said,  
 \* 588 \* that in my opinion the judgment ought to have been entered for the defendants upon the 5th plea, which alleges that the goods were carried subject to a just and reasonable condition made by the defendants, and assented to by the plaintiff. I think it is competent to a company, under the 17 & 18 Vict. c. 31, to impose conditions upon the carriage of goods without having a signed contract, provided the conditions do not extend to exonerate them from liability for wilful neglect or misfeasance, and are such as ought to be adjudged to be just and reasonable. For the reasons which I have given, I consider that the condition exonerating the defendants from responsibility for the loss of, or injury to, certain articles (including marbles), unless declared and insured according to their value, does not extend to losses or injuries arising from neglect, or default of the company or its servants, and, therefore, that the condition ought to have been adjudged to be just and reasonable. For these reasons, I think that the judgment of the Exchequer Chamber ought to be affirmed.

*Judgment of the Court of Exchequer Chamber reversed ; and judgment of the Court of Queen's Bench affirmed.*

Lords' Journals, 28th July, 1863.

## \* WENTWORTH v. LLOYD.

\*589

1864. April 28, 29 ; May 2, 6, 27.

W. C. WENTWORTH, *Appellant*.J. C. LLOYD and others, *Respondents*.*Evidence. Professional Secrecy.*

There is no presumption of fact to be made against a party who enforces the rule against the disclosure, by his solicitor, of knowledge professionally acquired.

Per LORD CHELMSFORD.

*Armory v. Delamirie* (Strange, 505) does not apply to such a case.

IN this case a suit had been instituted by the appellant to set aside a sale of certain estates and other property formerly belonging to him in New South Wales, which sale was made on his behalf by one of the respondents to the others of them, and the appellant impeached the fairness of the transaction. The case was heard before the Master of the Rolls, who in September, 1863, directed the bill to be dismissed. Evidence had been taken in Sydney, and one of the witnesses was a Mr. Wright, who had acted for some years as the appellant's solicitor in the colony. Mr. Wright was asked a question, the answer to which was prevented from being given by an objection founded on the fact that he had acquired his knowledge through his professional employment. In commenting upon the case the Master of the Rolls said, "Mr. Wright is asked this question, 'Did Mr. Wentworth ever say any thing to you on the subject of any of his dealings with Mr. Mort?' Before the answer was given the plaintiff interposed with this question, 'Were those communications between me and you professional?' To which Mr. Wright said, 'They were.' And the counsel for Mr. Lloyd of course did not press his question or obtain any answer. The plaintiff no doubt had a right to prevent Mr. Wright from stating what the plaintiff had told him about Mr. Mort. It is the client's privilege to prevent the solicitor \*from di- \*590 vulguing confidential communications. But if the client chooses to adopt this conduct, he must be subject to the rule laid down in *Armory v. Delamirie*,<sup>1</sup> where the keeping back of evidence

<sup>1</sup> Str. 505.

must be taken most strongly against the person who does so. When I say this I wish to distinguish between the case of the suppression of evidence by a witness, and the case where he declines to answer the question on the ground that he is not bound to criminate himself; in which case no presumption of guilt can be fairly drawn from his refusal to answer, or the privilege would be at once destroyed. This is no case of crimination. By the terms of the obligation he is under in this suit he is bound to supply every species of evidence, written or parol, that he can, and I must treat his refusal to allow a witness to answer a question in the same light as if he had kept a material witness out of the way, or refused or prevented the production of a document in his possession."

THE LORD CHANCELLOR (LORD WESTBURY), on the merits of the case, moved to affirm the judgment of the Court below.<sup>1</sup>

LORD CHELMSFORD concurred; and with reference to excluding evidence, on the ground that the knowledge of the facts inquired into had been professionally obtained, said: The use which the Master of the Rolls made of the exercise of the plaintiff's right to prevent the disclosure of confidential communications seems to me so entirely at variance with principle, and so utterly in contradiction to the well-known and invariably recognised privilege of professional confidence, that I cannot pass it by in

\*591 \* silence; and, without dwelling upon the contrasted case,

I think it would be found upon examination that the presumptions in the two instances to which his Honour referred, are exactly the reverse of what he assumed them to be. I confess that I am unable to conceive the analogy between a client closing the mouth of his solicitor upon a question as to professional communications, and the conduct of the jeweller in *Armory v. Delamirie*, who, upon a mounted jewel which had been found being brought to him, took out the stones and returned the empty socket to the finder, and not producing the jewel at the trial of the action brought to recover its value, was made to pay in damages the value of a jewel of the finest water, which would fit the socket, upon the rule *omnia præsumuntur contra spoliatorem*. But a person who refuses to allow his solicitor to violate the confidence of the

<sup>1</sup> The counsel for the appellant were the Attorney-General, Mr. Southgate, and Mr. Surrage; for the respondents, Mr. Rolt, Sir. H. Cairns, Mr. Baggallay, Mr. Dickinson, and Mr. Erskine.

professional relation cannot be regarded in that odious light. The law has so great a regard to the preservation of the secrecy of this relation, that even the party himself cannot be compelled to disclose his own statements made to his solicitor with reference to professional business.

As Lord Brougham says, when speaking, in *Bolton v. The Corporation of Liverpool*,<sup>1</sup> of the supposed right to compel the disclosure of such communications: "It is plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights." The exclusion of such evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, every thing must be taken most \*strongly against \*592 him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice. I have been drawn aside from considering the facts of this case through an apprehension that the authority of the Master of the Rolls might be hereafter asserted as establishing what appears to me to be a most serious departure from the principles of the law of evidence applicable to professional confidence.

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\* MALCOMSON v. O'DEA.

\*593

1862. July 3, 4, 10, 11. 1863. February 24; July 28.

WILLIAM MALCOMSON, *Appellant*.

JOHN O'DEA and others, *Respondents*.

*Several Fishery. Navigable River. Crown Grant. Entries of Payment of Rent. Bill and Answer in Chancery. Evidence.*

The soil of navigable tidal rivers, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery therein is *primâ facie* in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the Crown, and might, lawfully, have been exercised by the Crown

<sup>1</sup> 1 Mylne & K. 94, 95.

before Magna Charta, and the several fishery could, lawfully, be afterwards made the subject of grant by the Crown to a private individual.

Where a grant of a several fishery had been made by the Crown to a corporation, and rent received by the Crown in respect thereof for a long period of time, the earliest grants describing it as "an ancient inheritance of the Crown," it was held that the lawfulness of the origin of the several fishery might be presumed.

There was a dispute as to the limits of the fishery. In an action against alleged trespassers, the plaintiff, the lessee of the corporation, tendered in evidence the bill and answer in chancery in a suit instituted a great many years before by another grantee of the Crown against the corporation, and in which the limits of the alleged fishery were described :—

*Held*, that as part of the history of the fishery and of the claims made to it, the bill and answer were admissible in evidence.

The plaintiff also tendered in evidence an "Assembly Book," belonging to the corporation, dated in 1676, and containing entries of the rents due to the corporation from its various tenants, among which were entries of rents paid in respect of this fishery :—

*Held*, that the book was admissible as an ancient document showing the exercise of acts of ownership.

The plaintiff also tendered in evidence, for the purpose of showing the meaning of a particular phrase in the grants, a letter of license from the Crown, in 1676, to one of its grantees, to aliene the subject matter of the grant :—

*Held*, that the license was admissible for that purpose.

WILLIAM MALCOMSON claimed to be entitled, under a lease from the Mayor and Corporation of Limerick, to a several fishery in the river Shannon, called the Fisher's Stent, extending from a place called the Lax Wear in the east, to the river Meelick in the west;<sup>1</sup> and he complained that the defendants had entered his said several fishery and taken away his fish. The defendants pleaded several pleas, which in substance alleged that the Shannon was a public navigable river, and that the *locus in quo*

<sup>1</sup> The river Shannon, for the purposes of this case, may be described as flowing (within the county of Limerick) in a southerly course from St. Thomas's Island, which is above the city of Limerick, where the "Lax Weir" is situated, passing by Island Point to Thomond's Bridge (between which two places the alleged trespass was committed by these defendants) to the city of Limerick, where it begins to take a westerly course for some distance, and then turns northerly to a part where the river Meelick (which divides the county of Limerick from the county of Clare) falls into it. Some small distance beyond this, and within the county of Clare, is situated Castle Donnell, often referred to in this case, and described by some of the witnesses as popularly known by the name of Cromwell's Castle. It there widens and falls into the sea some distance farther on.

was part of the same. The plaintiff put on the record several replications to the defendants' pleas, the most material of which were to the tenth and eleventh defences, and alleged that the *locus in quo* was a several fishery, and an ancient possession of the Crown, which became vested in the Mayor and Corporation of Limerick, and that they, by lease of January 31, 1834, demised the same to Poole Gabbett for ninety-nine years, through whom the plaintiff derived title. Fifteen issues were framed: 1. Whether the defendants had entered the plaintiff's close; 2. Whether the close was the close of the plaintiff, or the fish caught therein were the fish of the plaintiff; 3. Whether the *locus in quo* was a several fishery; 4. Whether it was the several fishery of the plaintiff; 5. Whether the plaintiff had a several fishery within the limits alleged; 6. Whether the *locus in quo* was outside the limits of the alleged fishery; 7. Whether the fish were the fish of the plaintiff; 8. Whether the \**locus in quo* was a common pub- \* 595 lic fishery; 9. Whether the public had a common prescriptive right of fishing therein; 10. Whether the defendants at the time, &c. had a prescriptive right of fishing therein; 11. Whether the replication to the tenth defence was true in substance and in fact; 12. The same as to the replication to the eleventh defence; 13. Whether the defendants took away the fish, and converted the same to their own use; 14. Whether the fish mentioned in the ninth paragraph of the declaration were the plaintiff's fish; and 15. Whether the defendants were entitled to take the fish on any of the grounds relied on in the first eight defences.

The cause came on for trial at Dublin, in February, 1858, before the Lord Chief Justice of the Court of Queen's Bench and a special jury.

There was ample proof that the plaintiff had title under the Corporation of Limerick, and that the defendants had committed the alleged acts of trespass. The real questions were, whether the Crown had, in fact, granted within the *locus in quo* a several fishery to the Mayor and Corporation of Limerick, and whether the Crown had, in law, power to make such a grant.

The evidence was in substance as follows:—

An Insuperimus Charter, dated in 1414, by Henry V., referring to and confirming previous charters of Edward and John, and granting, among many other things, "the profits of a certain fishery which is called 'Lax Wear,' with its appurtenances, to the

same mayor and commonalty [of Limerick], and their successors for ever." That was confirmed in 1423 by Henry VI. In 1576 Queen Elizabeth directed letters patent to issue, called a Fiant, by which she commissioned certain persons therein named on her behalf, to demise for twenty-one years to one Edward Moly-

\* 596 neux, at a rent of 53s. 4d., "the \* wears, commonly called the Fisher's Stent, near the city of Limerick, which

do lie from the Lax Wear, or common wear, in the east part, until the river nigh to Castle Donnell in the west part, with all the customs, duties, profits, &c. to them and every of them appertaining and belonging, parcel of her Majesty's ancient inheritance, and of long time concealed." It was much observed upon that the

Crown did not here demise Lax Wear, which it was contended arose from the fact that that had long before been the subject of grant to the corporation. The demise contained a clause requiring the

tenant to maintain and repair the wears during the term, and another to the effect that if the rent should be in arrear for twelve weeks after any of the days for payment, Molyneux might be made to pay double value, or might be evicted at the pleasure of the

Crown. There was an entry of this lease of the Fisher's Stent in the books of the Auditor-General, which also contained entries of the payment of the rent. Molyneux was afterwards evicted, and

the mayor and bailiffs made the tenants in his stead. The entry in the books of the Auditor-General after this change of tenancy, called Molyneux "the late farmer of the wears called the Fisher's

Tente, at 53s. 4d. per annum," and it went on with these words of description, "The Mayor and Bailiffs of the City of Limerick, tenants of the aforesaid wears." In 1582 the Queen granted them

a charter which contained an *inspeximus* and confirmation of that of Henry V. in the very words of Henry's Charter, as to the wear and its appurtenances. This was declared to be done in respect of

the services of the citizens "in that most wicked rebellion, by Gerald Earl of Desmond." There was a special grant to the

mayor, bailiffs, and citizens for ever "of all these wears and

\* 597 pools in the water of Shannon, within the liberties of \* the said city, called the Lex Werres and Fisher's Stent, with

all and singular their profits, &c., and to have, hold and enjoy all and singular franchises, jurisdictions, privileges, perambulations, grounds, and waste pieces of land called the New Stent, or New

Extent, the wears called Lex Weers, gurgites, Fisher's Stent, in-

gate and outgate customes," &c. Then came the provision for the rent, which was fixed at 6*s.* 8*d.* a year. There was also a charter of James I. to the city of Limerick, confirming all the wears and fisheries "granted by us or our progenitors, Kings or Queens," of England.

The rent roll of James I. described the rent payable under the grant of Elizabeth at 6*s.* 8*d.*, and the "increased rent, 8*s.* 10½*d.* in respect of the weares, near the City of Limerick, called the Fisherstente, lying from the Lex Weare on the east, as far as the river called Castle Connell on the west.<sup>1</sup> In 1648 a rent roll of Charles I. described the mayor and sheriffs as "tenants of the wears called the Fisherstent," for which they paid 6*s.* 8*d.* a year. In the time of the Commonwealth a commission was issued to examine into these matters, and the commissioners set the rent of "the Limerick salmon weare and nett fishing" at 165*l.* a year, and three persons, named Playstead, Bennett, and Pawsey, became tenants at that rent. After the Restoration, Sir George Preston obtained a grant of several fishings in Ireland. The grant recited that they had fallen to the Crown by forfeiture for rebellion; and in consideration of the eminent services of Sir George Preston, the Crown granted to him, amongst other things, "all that the fishing of pike, and salmon, and other sea fish, and eels, in the great salmon wear, called the Lax Wear, in the River Shannon," then describing their "boundaries, formerly \* 598 belonging to our Crown, but enjoyed by the corporation of Limerick, paying a rent"; and after describing the boundary lands with great minuteness, there were these general words, "and also all and singular other fishings of salmon, and pike, and other fish in the said River Shannon." The rent was fixed at 5*l.* a year. The mayor and bailiffs complained of this grant as in derogation of their own rights, but as it appeared to have been confirmed by an Act of the Irish Parliament, they compromised the matter by purchase. In the Communia Roll of 1665 there was a recital of the Commonwealth lease; the names of the tenants and the amount of the rent were given, and it was alleged that one half year's rent was in arrear, and process was ordered to issue. The mayor and sheriffs pleaded in answer that they were not liable to make this payment to the Crown, and they set forth the charters

<sup>1</sup> This was in fact the river Meelick, which ran into the Shannon, near to Castle Connell.



of Elizabeth and James, to which the Attorney-General replied, and admitted these charters; but there the Roll became imperfect, and no conclusion appeared upon it. But to make up for this deficiency, there was produced a roll of the Equity Exchequer, which stated these proceedings, recorded the Attorney-General's confession of the truth of the plea, and the order by the Court to discharge the mayor and sheriffs from the claim. In the receipt-book of the Exchequer in 1665 there was an entry of the payment by the corporation of 6s. 8d. by the year in respect of "the wears called the Fisher's Stent, in the county of the city of Limerick." In that same year Sir George Preston obtained another grant of letters patent, which recited the former grant, or what "we did intend to grant," the Act of the Irish Parliament, and the fact that Sir George Preston had been, by a decree of the

Court of Claims, disappointed in obtaining what he expected; and \* 599 then there was a grant of the "weare, called the Lax Weare, in the River Shannon," bounded on the north by the lands of Bancke, on the east by Thomas' Island, on the south by the lands of Corbally, and on the west with the Shannon, "and all fishings in the said weare"; but nothing was said of the Fisher's Stent. In 1669 the corporation granted a lease for one year to Robert Pasey of the "nett fishings, fishing stentes, and fishing courses" in the Shannon, "excepting the Lax Weare," and this lease contained a covenant of indemnity against molestation. In 1670 a similar lease was granted to Josiah Lynch. In 1674 Sir George Preston filed a bill in Chancery against the mayor and sheriffs of Limerick, setting forth the grant to himself, complaining that the defendants had possessed themselves of his fishings, and praying for an account and for restoration to his fishings in the said river. The mayor and sheriffs put in an answer, and in the present appeal one question raised on the exceptions was whether the bill and answer were admissible in evidence, the answer being a statement by the mayor and corporation of their own title. A similar objection was raised to the admissibility of the "Assembly Book" of the corporation for 1676, which recited that "the nett fishing and Fisher's Stent, belonging to the corporation," had that day been let for one year to Edmund Carroll for 60l. for the year. In 1677 Sir George Preston got a third grant by letters patent, which recited the first grant, but in fact granted no more than he had obtained before,

namely, the Lax Wear. Negotiations followed between the mayor and sheriffs of Limerick and Sir George Preston, and in 1678 there was a letter of license from the king giving power to Sir George Preston to alienate. This letter recited the grant to Preston, and described it as a grant "of the fishing of \* pike, salmon, and other sea fish, and eeles, in the great \* 600 salmon weare, called the Lax Weare, in the county of the City of Limerick, and the fishing in the River Shannon westward of the said weare," at a rent of 5*l.* a year, and the mortgage by him of the grant, and a treaty between the mayor and sheriffs of the one part, and Sir George and his mortgagees of the other part, for the purchase of the rights of the latter; whereupon this letter of license to alienate was granted. A conveyance was afterwards made to the mayor and sheriffs of the fishing in "the Lax Weare, mearing on the north side with the land of Bank, on the east with Thomas his Island; on the south with the lands of Corbally, and on the west with the said river of Shannon." Then came a lease, dated in 1685, for twenty-one years, from the mayor and sheriffs to one John Leonard, of "the Lax Wear, in the River Shannon, near, &c., together with the fishings in the said river of Shannon, commonly called the net fishings, or Fisher's Stent, extending from the New Stent, or New Extent, near the said Lax Wear, westward in the said river." The considerations for this lease were a fine of 300*l.*, and a rent of 200*l.* a year. In 1719 the corporation granted a lease for ninety-nine years, commencing from 1726, to Roche and others, of the same fishings, which were described in the same terms; the fine was 1200*l.* and the rent 352*l.* a year. The accounts of the corporation showed that these rents had been paid. In 1834 a lease was granted by the corporation to Poole Gabbett, of Corbally, for ninety-nine years, at a rent of 300*l.* a year, and in this lease there was a covenant that no disturbance in Gabbett's enjoyment of the fishing should be a ground for withholding of the rent unless such disturbance proceeded from eviction on a superior title. In 1857 the sons and administrators of Mr. Poole Gabbett granted a lease of the fishings to the \* plaintiff for seventy-five years, upon a fine \* 601 of 9250*l.*, and at an annual rent of 301*l.* The description in this lease was the same as in those formerly granted. In 1840, while Mr. Gabbett was in possession, he brought an action against one Clancy for trespassing on the fishings, and recovered judg-

ment. The damages, it being made a question of right (for the defendant pleaded that it was a public fishery in a public river), were assessed at 6*d.*, but with full costs of suit.<sup>1</sup>

The defendants' counsel took eighteen exceptions, to some of which alone is it necessary to refer.

The 9th exception was as to the admissibility of the bill and answer of 1674.

The 10th exception was as to the admissibility of the entries in the assembly book of the corporation for 1676.

The 16th, 17th, and 18th exceptions were as to the sufficiency of the evidence, the defendant contending that the Lord Chief Justice was bound to direct the jury that the plaintiff was not entitled to a several fishery in the tidal part of the river Shannon, the said river being a navigable river, there being no evidence to rebut the public right of fishing therein; and that the Lord Chief Justice ought to have directed the jury to find for the defendant on all the issues but the 10th issue.<sup>2</sup> And that his Lordship ought to have directed the jury that there was no evidence of the plaintiff's right to an exclusive or several fishery in the part of the river in which the fishing by the defendants took place.

\* 602     \* The jury returned a verdict for the plaintiff. The exceptions were afterwards argued before the Court of Queen's Bench,<sup>3</sup> and that Court gave judgment for the plaintiff, overruling all the exceptions. The case was taken on error to the Exchequer Chamber, and on the 21st November, 1860, that Court reversed the judgment given below, and gave judgment for the defendants on the 9th, 10th, 16th, 17th, and 18th exceptions, and directed a *venire de novo*, Mr. Baron Fitzgerald *diss.*, except as to the 10th exception. The plaintiff thereon brought error in this House.

The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Williams, Mr. Justice Willes, Mr. Justice Crompton, Mr. Baron Bramwell, and Mr. Justice Blackburn, attended.

<sup>1</sup> Gabbett v. Clancy, 8 Irish Law, 299. In the course of giving judgment, Mr. Justice Burton remarked that, at the trial, the jurors had been called on "to find the limits of the fishery called the Fishers' Stent, and their finding was that the said fishery extended from the Lax Wear on the east to the River Meelick on the west."

<sup>2</sup> In which the defendant claimed a prescriptive right, as part of the public, to fish in a public navigable river.

<sup>3</sup> According to the provisions of the 38 Geo. 3, c. 31, § 1 (Ir.).

*Sir H. Cairns* and *Mr. Mellish* (*Mr. T. H. Baylis* was with them), for the plaintiff in error. — One objection made in the Court below was, that the Crown could not, after *Magna Charta*, grant a several fishery in a public navigable river. Perhaps so; but the Crown might grant such a fishery if it had been in existence previous to *Magna Charta*.<sup>1</sup> It had been so here. That is shown by the language of all the charters, for all of them speak of the fishery as a well-known thing, and in the Charter of Queen Elizabeth, the description is that of "the ancient inheritance" of the Crown. During all the time in which it is thus shown to have been in existence, the Crown received rent for it.

It may be true that the mayor and sheriffs are not entitled \* to the soil of this public navigable river; but ac- \* 603 cording to Lord Coke a man may have a several fishery, though the property in the soil is not in him.<sup>2</sup> The word "gurgites" in the charter describes a place of deep water, *Du Cange*,<sup>3</sup> and a lax wear is a salmon wear, the word "lachs" being the Saxon for salmon.<sup>4</sup> It is admitted that in John's *Magna Charta*, it is said, "*Omnes kidelli decetero deponantur penitus per Thamisiā et Medwayā et per totā Angliā, nisi per costeram maris*"; but that does not prevent the Crown from having a several fishery in a navigable river, but only requires that obstructions to the free navigation of such a river shall be removed; and such is the construction put by Lord Hale<sup>5</sup> on similar words in the Charter of Henry III.; and in commenting on it, Lord Coke,<sup>6</sup> first translating it thus, "No owner of the banks of rivers shall so appropriate or keep the rivers several to him, to defend or bar others either to have passage or fish there, otherwise than they were used in the reign of Henry II.," adds, "This statute, saith the Mirror, is out of

<sup>1</sup> As to when *Magna Charta* and English laws were first introduced into Ireland, reference was made to the "Argument" by Prynne in Lord Macguire's Case, 4 How. St. Tr. 690.

<sup>2</sup> Co. Litt. 122 a, and Hargr. n. (7).

<sup>3</sup> Gloss. voc. GURGES, "*Est locus verticulus in flumine altus et profundus, vorago, fossa, lacuna, barathrum: sed proprie est locus in fluvio arctatus seu ad construendum molendinum, seu ad capiendos pisces.*" *Id.* voc. GORDUS, gorges. "*Locus in fluvio coarctatus piscium capiendorum gratia.*"

See also Bailey, "Wear (wæp, Sax. weþr, Teut.), a stank or great dam in a river fitted for taking fish or conveying the stream to a mill."

<sup>4</sup> "Lax (lachs, salmon, Teut.), a kind of fish." Bailey's Dict.

<sup>5</sup> De Jure Maris, Harg. Tracts, ch. v. p. 22.

<sup>6</sup> 2 Co. Inst. Mag. Ch. c. 16.

use, ' *Car plusors rivièrs sont ore appropriés et engarnies, et mises in defence, que soilount estre commons a pisher et user en temps le Roy Henry 2.*' " That would show that the creation of wears

\* 604 by \* act of the Crown might be valid even after Magna Charta; but there is no doubt that if in existence before that time, they might afterwards be lawfully granted by the Crown to a subject; *Williams v. Wilcox*.<sup>1</sup> And such a several fishery granted by the Crown, has been held to be an incorporeal hereditament, and a term of years could not be created in it without deed. *The Duke of Somerset v. Fogwell*.<sup>2</sup> In *The Duke of Devonshire v. Hodnett*,<sup>3</sup> the grant by patent of the soil and bottom of a river in Ireland, was held to be evidence that the Crown was seised in fee of the soil and bottom, and the several fishery at the time of making the grant.

The bill and answer were admissible in evidence, to prove a pending suit. The question whether the Lax Wear and the Fisher's Stent were the same or different things, was a material question in this case, and the bill and answer could not be inadmissible, because they explained that matter. If they were admissible on any ground, the purpose for which they were produced became immaterial, and they were rightly received in evidence. *The Irish Society v. The Bishop of Derry*.<sup>4</sup> Without contending that the bill and answer proved the truth of the statements contained in them, it was clear from them that the Lax Wear and the Fisher's Stent were distinct things, and admitting Preston's then existing title to the former, the right of the corporation to the latter was distinctly asserted and sustained. Mr. Justice Christian in the Court below said, that the suit was terminated by a compromise. So it was, but only with relation to the Lax Wear. In order to ascertain the meaning of that compromise, a Court must put itself into the position of the parties at the moment.

\* 605 The same rule applies here as applies to \* the construction of a will. " For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact," is the proposition of Sir J. Wigram.<sup>5</sup> That was the principle acted on in *Shore v. Wilson*,<sup>6</sup> and that principle

<sup>1</sup> 8 A. & E. 314.

<sup>2</sup> 5 B. & C. 875.

<sup>3</sup> 1 Hudson & B. 322.

<sup>4</sup> 12 Clark & F. 641.

<sup>5</sup> Wigr. on Wills, prop. 5.

<sup>6</sup> 9 Clark & F. 355.

applies to the present case, and makes the bill and answer admissible. The bill and answer form part of the history of the fishery.

Then as to the entry in the "Assembly Book" of the corporation, that was properly admitted in evidence, first, because such a book is a public and not a private book, and all the members of the corporation and the world at large would seek in such a book for an accurate statement of the acts of the corporation. It was admissible on the principle laid down in the cases of which *Price v. Earl of Torrington*<sup>1</sup> was the first example. The entry showed, in fact, that on that day the corporation came to a resolution (the body can only act by resolution), and the entry of such resolutions is the duty of an officer of the corporation, so that even if such an entry was to be treated as a private entry, it was made by a man in the ordinary discharge of his duty. That man is now dead, and entries thus made by him are admissible in evidence, *Pitman v. Maddox*; <sup>2</sup> *Doe d. Patteshall v. Turford*; <sup>3</sup> *Poole v. Dicus*.<sup>4</sup> In the Court of Exchequer in Ireland, the case of *Marriage v. Lawrence*<sup>5</sup> was relied on. There an entry in the books of the corporation of Maldon, made in the reign of Henry VIII., relating to a prosecution of some persons for landing goods within the limits of the \* borough without paying tolls, though made by the \* 606 clerk of the borough in the ordinary discharge of his duty, was held to have been properly rejected at Nisi Prius. That case cannot be supported. Not merely entries of facts made at the time are admissible, but, for the purpose of explaining the meaning of words in deeds or wills, as for example here, the meaning of the words "Fisher's Stent," evidence of the acts and writings of parties are receivable, *Ricketts v. Turquand*.<sup>6</sup> [THE LORD CHANCELLOR. — Can a legatee produce the letters of a testator, to explain the meaning with which he used certain words in a will? He can: *Drake v. Drake*,<sup>7</sup> where evidence of the state of the family was admitted to afford an explanation of an ambiguous description in a will.

*Mr. Manisty* and *Mr. Barry* (of the Irish bar), for the defendants in error. — The bill and answer were not admissible in evi-

<sup>1</sup> 1 Salk. 285, 1 Sm. Lead. Cas. 235.

<sup>2</sup> 2 Salk. 690.

<sup>3</sup> 3 B. & Ad. 890.

<sup>4</sup> 1 Bing. N. C. 649.

<sup>5</sup> 3 B. & Ald. 142.

<sup>6</sup> 1 H. L. Cas. 472.

<sup>7</sup> 8 H. L. Cas. 172.

dence. They were produced not as mere proof of a pending suit, but for the purpose of supplying the proof of an important fact, a material and necessary link in the evidence. The grant of Elizabeth left it doubtful what were the limits of the fishery claimed by the corporation. The bill and answer were put in to define those limits, the limits being themselves the very matter in dispute in that suit. The same object was sought to be attained by the production of the "Assembly Book," but the entry there was clearly inadmissible, for not only was it an entry made by the corporators themselves in their own favour, but it was made at a time when the very matter it related to was in dispute between the corporators and other parties, and therefore on the single ground

\* 607 of \* being an entry *post litem* was inadmissible. (LORD CHELMSFORD mentioned *Rogers v. Allen*.<sup>1</sup>) There the licenses were fortified by proof of actual payment of rents. The cases cited on the other side are not authorities for the admissibility of this evidence. It is not disputed that if the evidence is admissible for a particular purpose, it must be admitted, whatever may be its effect, according to *The Irish Society v. The Bishop of Derry*.<sup>2</sup> But this evidence is used to create the grounds of its own admissibility. In the cases cited on the other side there was no doubt as to the identity of the property, or as to the fact that the testator had the power to dispose, and meant to dispose of it. Both parties acknowledged his right; the only point was, in favour of which of them he had exercised it. That was so in *Ricketts v. Turquand*,<sup>3</sup> and in *Drake v. Drake*.<sup>4</sup> Here the identity of the property is the very question in issue, and the right of the Crown to grant a several fishery is questioned. Yet this evidence is tendered to prove the identity of the property, and to establish the fact that the grant of it under a particular description was made by the Crown. The plaintiff claims title under the corporation; the defendants are distinct from, and opposed to both. They are third parties, who cannot be affected by any thing which is done between the other two. The corporation is, in fact, the plaintiff, and seeks to give in evidence its own proceedings and its own acts in support of its own title. Put a private individual in the place of this corporation. A son could not in a dispute between himself and a third person produce memoranda of the father to show the nature and extent

<sup>1</sup> 1 Camp. 309.

<sup>2</sup> 1 H. L. Cas. 472.

<sup>3</sup> 12 Clark & F. 641.

<sup>4</sup> 8 H. L. Cas. 172.

of the property derived by the son from him. [THE LORD CHANCELLOR. — There is here a difference \* of names ; may \* 608 not these documents be referred to for the purpose of explaining that difference ?] Certainly not ; for that difference raises the substantial question on the case. Entries made by a third person, deceased, in his books, of receipts of rent from his tenant of a particular estate, are not evidence to prove the identity of the land in a cause between two others, *Outram v. Morewood*.<sup>1</sup> In *The Mayor, &c. of London v. The Mayor, &c. of Lynn*,<sup>2</sup> the defendants were not allowed to put in their own corporation books to prove their own rights, and in the case of *The Corporation of Hull v. Horner*,<sup>3</sup> where such evidence appeared to have been admitted, it was explained to have been admitted by consent. The principle that a party cannot make evidence in his own favour was maintained in *Marriage v. Lawrence*,<sup>4</sup> and was acted upon by Lord Tenterden in *Brett v. Beales*,<sup>5</sup> where it was said that there was no distinction between entries affecting the private property of an individual and of a corporation. In *The Corporation of Waterford v. Price*,<sup>6</sup> when all these cases, including that of *Rogers v. Allen*,<sup>7</sup> were cited, it was held that in a dispute as to the right of appointing a schoolmaster, the books of the corporation could not be admitted in evidence to prove its own title, for that the schoolmaster was not in such privity with the corporation as to justify it in using that evidence as against him. So in *The Attorney-General v. Warwick*,<sup>8</sup> on a question whether the appointment of a curate belonged to the \* vicar or to a corporation, entries in old \* 609 corporation books were held not to be receivable in evidence against the vicar, to show that the curate had from time to time been appointed by the corporation. Lord Chancellor Lyndhurst there expressly adopted the case of *London v. Lynn*.<sup>9</sup> The case of *Price v. Lord Torrington*<sup>10</sup> is not in point. If that case can be supported at all, it is on sole point that the entry was admissible as made by a dead man in the discharge of his ordinary duty ; but it

<sup>1</sup> 5 T. R. 121. See *Padwick v. Wittcomb*, 4 H. L. Cas. 425.

<sup>2</sup> 1 H. Bl. 214, note (a).

<sup>3</sup> 3 B. & Ald. 142.

<sup>4</sup> Cowp. 102.

<sup>5</sup> *Moody & M.* 429, 5 Man. & Ryl. 435. And see *Hill v. Manchester and Salford Waterworks*, 2 Nev. & M. 573.

<sup>6</sup> 9 Irish Law, 310.

<sup>9</sup> 1 H. Bl. 214, note (a).

<sup>1</sup> Camp. 309.

<sup>10</sup> 1 Salk. 285.

<sup>4</sup> Russ. 222.



does not affect this case. In *Brain v. Preece*,<sup>1</sup> the entries of two workmen in a coal-mine, made in the ordinary course of business, were held not admissible to prove the price of coals; and Lord Abinger, then speaking of *Price v. Lord Torrington*, said, "It is better not to give any extension to that case." In *Percival v. Nanson*,<sup>2</sup> the receipts of a receiver were admitted solely on the ground that they charged himself with liability. The corporation here did not charge itself with liability, but asserted its rights. These entries, too, related only to the private property of the corporation; there was no public duty to make them, and they were in date *post litem*.

As to the 9th exception, the question is not only whether this was a several fishery, but also whether, supposing such a fishery to exist, the *locus in quo* was part of that fishery, and belonged to the plaintiff. The dispute between Preston and the corporation could not determine that point. The public asserted that neither of them had a right to it. Preston claimed a right under a grant of the weir. In a navigable river a weir is an obstruction to the navigation, but the plaintiff's claim is for a fishery where no weirs exist. In that view of the matter the dispute between  
 \* 610 Preston and the corporation \* becomes wholly immaterial in the present case, and therefore the bill and answer ought not to have been admitted.

The grants did not establish the plaintiff's claim. In the grant of 1576 to Molyneux, upon which in part the plaintiff's claim is founded, the thing granted is described as "the weirs called the Fisher's Stent," &c. Now there is no weir at what is now called the Fisher's Stent, and consequently that which is now claimed cannot be the subject of the grant, and not even by that Act of the Crown, supposing it to be legally valid, can the public in any way be interfered with in the enjoyment of fishing in this open navigable river. Suppose the rent reserved on these weirs had fallen into arrears, the distress must have been on the weir, the subject matter of the grant and of the rent, not on the open river four or five miles away.

The *Lord Fitzwalter's Case*<sup>3</sup> shows that a right such as is now claimed, must be strictly proved, for that the right to fish in navigable rivers "is common to all the subjects." In that case Lord

<sup>1</sup> 11 M. & W. 773.

<sup>2</sup> 3 Keb. 242, s. c. 1 Mod. 105.

<sup>3</sup> 7 Exch. 1.

Hale speaks of "gurgites" in a way to show that they are obstructions in a river, and that word, therefore, cannot be used, as it is now sought to be used, to describe an open part of the river. If, therefore, these grants conveyed any exclusive right of fishing, that right was confined to those places where weirs existed, and consequently the open part of the river, where the alleged acts of trespass were committed, is not affected by them.

The claim here was made as one of prescription, to support which, in such a case, the possession must have been undisputed and undisturbed, *Benest v. Pipon*.<sup>1</sup> The evidence shows it was not so here. So that even if the Crown had the power to create and make a grant of \* a several fishery, in a public \* 611 navigable river, which, since Magna Charta, it could not do, or if the several fishery had existed before that time, and was only granted afterwards, the possession here having been many times the subject of dispute and contention, cannot now be insisted on as lawful. There is no evidence [the learned counsel examined the evidence most minutely] sufficient to support this claim.<sup>2</sup>

*Sir Hugh Cairns* replied.

THE LORD CHANCELLOR (LORD WESTBURY) said the case had been elaborately argued. He proposed the following questions for the consideration of the Judges:—

1. Ought the 9th exception to have been allowed or disallowed?

2. Ought the 10th exception to have been allowed or disallowed?

3. Ought the 16th, 17th, and 18th exceptions to have been allowed or disallowed?

1863. February 24.

MR. JUSTICE WILLES delivered the unanimous opinion of the Judges.

My Lords, in answer to the first question, we are of opinion that the 9th exception ought not to have been allowed.

<sup>1</sup> 1 Knapp, 60.

<sup>2</sup> There were other points argued, one of which related to the form in which the judgment ought to have been entered in the Court below, but the questions put to the Judges confined their attention to the admissibility of the evidence, and its sufficiency for the purpose for which it was produced.

That exception was to the admission of a certified copy of a bill in the Irish Chancery, of the 16th of November, 1674, and of an answer thereto. The bill was filed by Sir George Preston \* 612 against the Corporation of Limerick \* and others, for the purpose of defending and quieting his alleged possession of a fishery substantially coextensive with that in dispute, and which he claimed under two grants of King Charles II.,<sup>1</sup> against aggressions of the corporation. It alleged difficulties in the way of an action at law, and prayed a discovery, account, and injunction. The answer was filed on the 10th of February in the same year, 1674-75, and after insisting that the matter was of common law cognizance, it proceeded, amongst other things, to allege that the corporation had been entitled to the fishery before the wars, and had never forfeited its right thereto. Now this bill and answer were not read as evidence of the facts stated therein. They were admitted, as appears by the record, "for the purpose of showing a pending suit." Was it then legitimate evidence in the cause to show that in the year 1674-75, there was a litigation between Sir George Preston and the corporation as to the right to the fishery, under conflicting grants from the Crown? We are of opinion that it was, as part of the history of the adverse claim of Sir George Preston, which ended in the reconveyance of 1684. The weight which the existence of that litigation adds to the dealings between Sir George Preston and the corporation is not dependent upon the assertions made by either of the litigant parties in the bill and answer. If A. were to claim property of which B. was in possession as grantee of the Crown, under an adverse title, *e. g.* a conveyance from the Crown as upon a forfeiture subsequent to B.'s grant, and were to take legal proceedings against B., and, upon B.'s answering, and setting up his own elder right, were then, in order to quiet B.'s title, to execute a deed purporting \* 613 \* to convey or release to him the whole or part, that would surely be a piece of evidence to prove to posterity B.'s title, by way of showing an assertion of title on B.'s part, and submission, upon that, of his adversary having a *prima facie* interest; and a reasonable man might conclude that the force of the admission was the greater because it was accompanied by the abandonment of a litigation, by reason of which, according to all probability, the facts

<sup>1</sup> As to the origin of this and similar grants founded upon the Irish Act of Settlement, see 2 Hallam's England, 534 et seq.

were more thoroughly ascertained and considered, and that under better advice than if the law had not been appealed to. We ought not to pass over a suggestion which has been made in the course of the case, that Sir George Preston's suit was or might have been collusive. If we were to adopt that suggestion we should be begging a question not touched by the exception, which we see no sufficient evidence to raise, and which, if there was, would be one for the jury, not the Court. We are of opinion, therefore, that the bill and answer were admissible for the purpose for which they were used at the trial, and that the 9th exception ought not to have been allowed.

Your Lordships' next question to the Judges is, Whether the 10th exception ought to have been allowed? That exception was to the admission in evidence of "a certain book purporting to be the assembly book of the Corporation of Limerick, in the year of our Lord 1676," to wit, an entry of the 16th of October, 1676; and also another entry of an account of rents in arrear. We cannot pass by this exception without noting that it treats the two entries as either both admissible or both inadmissible; and it might be a question, whether it could be sustained, supposing either of the documents mentioned therein to be admissible. We need not, however, further criticise its language, because, \* construing it not as one exception to the book, but as two \* 614 distinct and separate exceptions, one to the entry of the 16th of October, 1676, and another to the account of arrears, we are of opinion that each of such exceptions ought to have been overruled.

As to the first entry, relating to the letting of the net fishing and Fisher's Stent to Carroll, we are dealing with something done nearly two centuries ago, and the great stress of the case bore upon the proof of possession. The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence. In some cases written statements of title are admitted even when they amount to mere assertion, as in the case of a right affecting the public generally; but the entry now under consideration is admissible according to a rule equally applicable to a fishery in a private pond as to one in a public navigable river. That rule is, that ancient documents coming out of proper custody, and purporting

upon the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly, in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail. It may be a question,

whether the absence of proof of enjoyment consistent with \* 615 such \* documents goes to the admissibility or only to the weight of the evidence; probably the latter. This, however, is not material in the present case, where repeated payments and receipts of rent under leases were proved. The only question is, whether the entry is a mere statement that Carroll had become tenant to the corporation, or a mere direction to prepare a lease to him, or whether it purports to be his warrant and license for fishing in the river. In the former case it would be a mere written assertion by the corporation and its officers. In the latter it was an act of ownership; for it was a license to another to use the fishery. Nor was it less a license, because for want of a seal it was revocable, on the ground that a grant of an incorporeal hereditament for a time certain must be under seal, and that a corporation is incapable of passing an interest or giving an irrevocable license without seal. Whether strong or weak, it was an act of ownership as much as if one gave another a license of pleasure to fish in his river, which in its nature must be revocable. If Carroll had enjoyed the fishery under it he would have been a licensee, not a trespasser, and the license would have determined the amount he was to pay as such for the occupation, *Wood v. Tate*; <sup>1</sup> and *Mayor of Stafford v. Till*.<sup>2</sup> And according to the rule already stated, the absence of proof that he did is made up for by the evidence of ownership independent of the license. The cases relied upon to the contrary are cases where there was some mere assertion of title or mere direction to an agent to prepare a document, which would have been, if executed, an act of ownership. We know of no case in which an ancient document, coming from a

<sup>1</sup> 2 N. R. 247.

<sup>2</sup> 4 Bing. 75.

proper custody, and purporting to be an act of ownership, by way of lease or license over the property, in company \* with other evidence showing enjoyment consistent with \* 616 such ownership, has been rejected upon the ground that the enjoyment could not be referred to the particular document in question.

It was suggested, indeed, that the reason why an ancient lease is admitted is because it is signed by the lessee, as well as by the lessor, and so is an admission by a third person, and thus that an ancient lease not signed by the lessee is inadmissible. This, however, is contrary to our experience, and to the true reason for admitting such evidence, viz. because of its showing an act or acts of ownership. We are not disposed to narrow the bounds of the law of evidence with respect to ancient possession, and we think the ruling of that accurate lawyer, Mr. Justice Heath, in *Rogers v. Allen*,<sup>1</sup> is abundant authority for the admissibility of the entry in question.

As to the other document included in the 9th exception, we think it admissible for reasons which may, perhaps, also apply to that which we have been considering. It is certainly not legitimate evidence of ownership, for it is a mere statement of a particular fact; but we think it admissible for another purpose, namely, to show, by an authentic document of the time, the meaning of the language used in the license, and to be found in so many other places, viz. the "Fisher's Stent." The license relates to the "net fishing and Fisher's Stent." The account of arrears speaks of what may be reasonably inferred to be the same property as the "net fishing." The amount and effect of the evidence may be small, but the evidence is distinct, so far as it goes, that "Fisher's Stent" and "net fishing" were, in 1678, interchangeable terms.

\* This is not irrelevant, merely because the defendants \* 617 admit that the mayor and sheriffs are entitled, besides the wear, to some net fishing, which, however, they say, cannot be defined, and is therefore lost. Having heard the argument in your Lordships' House upon the construction of the words in the Charter of 25th Elizabeth "*les werres vocat lezwerres, gurgites, Fyssh-er's Stente*," we cannot say that this was not important evidence, nor wonder that the plaintiff preferred relying upon his own

<sup>1</sup> 1 Camp. 309.

proofs, rather than upon the defendants' qualified admission. We may consult ancient authors to learn the meaning of "gurgites," and why not learn of the governing body of Limerick in 1678, whose genuine language is before us, what was meant by the "Fisher's Stent" in their days.

The only remaining question is, whether the 16th, 17th, and 18th exceptions ought to have been allowed. We think all those exceptions ought to have been disallowed. The 16th exception is in substance that there was no evidence of a several fishery in the tidal part of the river Shannon, a navigable river, to take away or rebut the public right of fishing there. The 17th and 18th exceptions are in substance that there was no evidence of an exclusive or several right of fishery in the place where the defendant fished between the weir and Thomond Bridge.

Upon this record, no question properly arises with respect to the bed and soil of the river. If the finding as to that was entered by mistake (which, considering that a several fishery may include the soil, we do not say it was), it could have been amended by Lord Chief Justice Lefroy, and by him only, at chambers, from his notes. It is now quite immaterial as between these parties.

\* 618 No exception is founded upon it; and the argument \* of the learned counsel as to that extraneous matter cannot affect our opinion upon the true question raised by these three exceptions, which is, whether there be evidence of a fishery as found by the jury from the Lax Wear on the east, to the river Meelick on the west, that being the extreme limit of the county of the city.

That such a right may lawfully exist is clear. The soil of "navigable tidal rivers," like the Shannon, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *primâ facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II.

If evidence be given of long enjoyment of a fishery, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is,

not that you say, this is a usurpation, for it is not traced back to the time of Henry II., but that you presume that the fishery being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory.

Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleadings (following Blackstone) a "free" instead of a "several" fishery. This is more of the confusion which the ambiguous use of the word "free" has occasioned from a period as early as that of the Year Book of P. 7 H. 7, 13, pl. 3, down to the \*case of *Holford v. Bailey*,<sup>1</sup> where it was \*619 clearly shown that the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free" (used as in free warren), and a right in common with others, usually called "common of fishery," sometimes "free" (used as in free port). The fishery in this case is sufficiently described as a "several" fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil.

Much argument also took place with respect to the meaning of the words "gurgites," "gors," and "wears." They appear all to be words of more ample meaning than was allowed to them in the argument against the right. Of course we are principally concerned with the mediæval use of the word "gurges"; though, inasmuch as the use of Latin in legal documents has been justified by its unchangeableness, we are at liberty to observe, that classic authors applied the word "gurges" to the open sea, to a lake, and to the course of a river, instances of which are collected in the dictionary of Facciolati.<sup>2</sup> As to the use of the word in later times, Lord Coke says:<sup>3</sup> "Gurges, a deep pit of water, a gors or gulph, consisteth of water and land, and therefore by the grant thereof by that name the soile doth passe, and a *præcipe* doth lie thereof, and shall lay his esples in taking of fishes, as breames and roaches. In Domesday it is called guort, gort, and gors, plurally, as, for example, *de 3 gorz mille anguillæ*." To the same effect is the argument in *Throckmerton v. Tracy*,<sup>4</sup> which shows that "gurges" may stand for pool, and is of wider significance

<sup>1</sup> 13 Q. B. 426.

<sup>2</sup> Facc. Lex., voc. *Gurges*, Lond. ed.

<sup>3</sup> Co. Litt. 5 b.

<sup>4</sup> Plowd. 154.



than "wear." Cowell, under the word "gorce," finds fault with Lord Coke's statement, that "gorges" and "gors" corre-

\* 620 spond, and he says that "gort" \* is old French for "wear."

Cowell's criticism, however, is proved too narrow by reference to Kelham's Norman-French Dictionary, page 116, where "gors," "gorse," or "gorts," is translated "a stream or pool, a watery place, a wear, a fish-pond, a ditch, a dam, a gorce"; and with respect to the word "wear" itself, although its etymology be different, we find in the Anglo-Saxon Dictionary that it had anciently a more extensive application than now. At page 243 of Bosworth, the word "wær," or "wér," answering to our "wear," is translated, "1, an enclosure, a place enclosed; 2, a fish-pond, a place or engine for catching and keeping fish, a wear; 3, the sea, a wave." The only reference which we have met in the old books to the use of the word "wear" is the dictum in the Year Book,<sup>1</sup> from which it seems that a grant or exception of a wear includes the fishery there. Therefore, especially when we bear in mind the conciseness of language used in ancient times, we cannot doubt that any criticism founded upon a narrow construction of these words is deceptive. The word "gurgites," used in addition to "lax wears," instead of being restricted to imaginary or possible scattered wears, the existence of which is unproved, and the nature of which is unknown, appears to us more properly to apply to all the streams, pools, and reaches of the river, so far as the fishing extends. Probably it ought to be thus translated, and not as "wears," in the earlier documents.

There is no improbability in the early appropriation of this always valuable property, or even a more extensive fishery, either in the time of the Irish Princes, or in that of the Ostmen, who in this and other ports displaced the ancient inhabitants, and  
\* 621 who no doubt gave the name of \* Lax Wear (Leax Wær, or Lachs Wehr) to the chief accessory of the fishery, or by Henry II., in his grant to the companion of Strougbow. There is nothing improbable in its having been granted over in later times to the ancient and loyal city of Limerick.

It appears by the earlier documents, construed by the light of subsequent user, that the fisheries of the waters of Limerick, which means at least the fishery within the city bounds, were a distinct and separate property from before the time of legal memory, and

<sup>1</sup> M. 14 H. 8, 2, pl. 1.

that they included the Lax Wear and the Shannon, so far as the city boundary extended. All that fishery appears to have been granted to the corporation at latest by the Charter of 25th Elizabeth, under which rent has ever since been paid, and which granted the "*les werres*," called "*lex werres, gurgites, Fysher's Stente*," and reserved a rent "*de et pro predictis gurgitibus in predicta aqua de Shenyn vocatis Fisser's Stent*," and no rent out of Lax Wear, whereof the corporation had had undisputed possession, showing, as distinctly as language can, that the Fisser's Stent was something over and above the mere wear; and at least so early as that reign the fishing appears in terms by the Crown rent rolls and otherwise, A. D. 1577, "The said Wear commonly called the Fisher's Stent, near the city of Limerick, from the wear called the Lax Were on the east to the river near Castle Donel on the west," to have been substantially the same as it is now claimed by the plaintiff. The subsequent dealings with the property do not show that the corporation ever lost any part of the right acquired under the charter to the whole fishery, but, on the contrary, they show a long enjoyment of it to as great an extent as the mayor and sheriffs and their lessees seem to have thought it worth their while to enforce their rights, which were no doubt considerably \* interfered \* 622 with from time to time by reason of the neighbourhood of a large city, and the great extent of the property, making it difficult to watch, especially at night, and by reason of the ample rights which the public are, notwithstanding the several fishery, entitled to exercise upon the river as a public highway and port, making it impossible to warn people off, unless detected in the very act of salmon fishing; but without, so far as we can see, any such acquiescence of the proprietors as to constitute an admission on their part that the property has by surrender or otherwise been diminished since the reign of Elizabeth.

In our opinion the evidence strongly preponderated in favour of the plaintiff.

We spare your Lordships any discussion of the evidence in detail, because, having examined it for ourselves, we may, upon this principal part of the case, express our concurrence in the masterly judgment of Mr. Baron Fitzgerald, a performance which we cannot hope to improve upon.

We are thus of opinion that none of the exceptions to which the questions relate ought to have been allowed.

July 28.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, Mr. Malcomson, the plaintiff in error, was also the plaintiff in the Court below in an action brought by him against the defendants to recover damages for having fished, and having carried away the fish from a fishery in the river Shannon, claimed by him as lessee of the mayor and sheriffs of Limerick, who claimed to be owners of that fishery.

At the trial of the action, a bill of exceptions was tendered to the admissibility of documents in evidence, and  
 \* 623 \* the bill of exceptions was duly received by the learned Judge. On the question coming to be argued in the Court of Queen's Bench in Ireland, the Court disallowed all those exceptions. From that judgment there was an appeal to the Court of Exchequer Chamber in Ireland, and the Court of Exchequer Chamber differing from the Court of Queen's Bench, allowed the 9th, 10th, 16th, 17th and 18th of those exceptions. From that judgment of the Court of Exchequer Chamber, the present appeal is brought.

My Lords, the learned Judges who attended your Lordships' House on the occasion of the argument of this case, have delivered an unanimous and very elaborate and learned opinion by the mouth of Mr. Justice Willes. The conclusion at which the learned Judges arrived was, in truth, if I divined rightly, anticipated by your Lordships at the end of the argument. Being therefore prepared for their conclusion, your Lordships will agree with them.

My Lords, I cannot forbear from expressing the feeling of admiration with which I have read that opinion, and also the masterly judgment given by Mr. Baron Fitzgerald, in the Court below. I entirely concur with the reasons of the learned Judges, and therefore think it unnecessary to repeat them now to your Lordships, but shall move your Lordships that the judgment of the Court of Exchequer Chamber in Ireland be reversed, and that the judgment of the Court of Queen's Bench be affirmed.

LORD CRANWORTH and LORD CHELMSFORD entirely concurred.

The order entered on the Journals directed that the  
 \* 624 \* judgment of the Court of Exchequer Chamber in Ireland

be reversed; and judgment of the Court of Queen's Bench in Ireland affirmed; and that the record be remitted to the said Court of Exchequer Chamber.

Lords' Journal, 28th July, 1863.

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DI SORA v. PHILLIPPS.

1863. April 24, 27; May 31; June 8, 11, 15; July 28.

The DUCHESS DI SORA, *Appellant*.

A. L. PHILLIPPS and others, Executors, &c., *Respondents*.<sup>1</sup>

*Foreign Contract. Construction. Foreign Law. Interest. Decree varied. Costs.*

When a contract is made in a foreign country, and in a foreign language, an English Court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and fourthly, evidence of any peculiar rules of construction which may exist in that law; and must then itself interpret the instrument on ordinary principles of construction.

A., the younger of two sisters (the only children of their father), was about to be married. By a pre-nuptial contract executed abroad, where the marriage was to be celebrated, and the parties to it were domiciled, the father agreed to give A. a dowry of 40,000*l.*; of which, 20,000*l.* were to be paid within six months after the marriage; the remaining 20,000*l.*, divided into two sums of 10,000*l.* each, were made payable, one sum on a given event, the other on the father's death, with power reserved to him to pay the last-mentioned sum during his life. In the contract he declared his intention to give to A. an equal portion with her sister of what he should leave as residue, and used words which appeared to make it doubtful whether this portion was to be ascertained before or after payment of debts and legacies. By his will he gave legacies to an amount which, with the debts, entirely exhausted what would otherwise have been residue. The final sum of 10,000*l.* was not paid in his lifetime. After his death A. filed a bill against his representatives, to obtain payment of this sum, and also payment of the share of the residue, calculated on its gross amount before payment of debts and legacies. The Court below held that on the proper construction of the contract this latter claim was unfounded; \* and, as to this claim, dismissed the bill with costs, but ordered pay- \* 625  
ment of the 10,000*l.*, with interest to be calculated from the period of six months after the father's death:—

<sup>1</sup> *Castrique v. Imrie*, Law Rep. 4 H. L. 427.

*Held*, that the order dismissing the bill with costs was right, for that the claim was founded on a misinterpretation of the contract made by the plaintiff, and was not the consequence of any act of the testator, such as ought to make the costs come out of the estate.

But the decree was varied so far as related to the interest on the 10,000*l.*, which was ordered to be calculated from the date of the father's death.

JOHN TALBOT, 17th Earl of Shrewsbury, had two daughters, Mary and Gwendaline, and no other issue. In the year 1835, the Lady Gwendaline married Prince Borghese, at Rome, on which occasion a "preliminary contract" (afterwards confirmed by a settlement) was executed. The Earl was to give a dowry of 40,000*l.*, of which 20,000*l.* were to be paid in six months after the marriage had taken place, with interest in the mean time at five per cent.; 10,000*l.* were to become payable on the death of the then Countess Dowager, and the remaining 10,000*l.* were to be paid at the death of the Earl, with liberty reserved to him to pay the same during his life, should he so think fit. The third article declared that "there shall not be any interest payable, except from the periods at which the aforesaid instalments" (the two sums of 10,000*l.* each) "shall become payable," up to the time at which "they shall be really paid." The fifth article was in these words, "*Oltre la suddita dote così costituita, sua Eccellenza il Signor Conte di Shrewsbury assegna, sino da ora, a titolo parimente di dote, alla Signora sposa una porzione, uguale agli altri eredi in concorso, nella di lui eredità libera, depurata da debiti e legati, di cui potesse essere gravata al momento dell' avvocazione.*"

\* 626 \* The marriage took place. The only child of it which survived infancy was the plaintiff, now Duchess of Sora. The Princess Borghese died in October, 1840. The Dowager Countess of Shrewsbury died in 1847, whereupon the first of the sums of 10,000*l.* became payable. The Earl did not pay it, but paid interest on it from that time. The Earl made a will, by which he directed his debts, &c. to be paid, and he devised the residue of his estate to two persons in trust, for purposes stated in his will, and which, with his debts, exhausted the residue. He died in November, 1852, and thereon the second sum of 10,000*l.* became payable. In 1854, the plaintiff filed her bill (which was afterwards amended) against the representatives of the Earl, and all other necessary parties, praying that payment of the two sums of 10,000*l.* might be ordered, and also that her rights in respect of

the real and personal estate of the late Earl might be ascertained and declared, regard being had to the 5th article of the preliminary contract, &c. and for general relief. In 1858, the plaintiff filed a supplemental bill, setting forth the preliminary contract, and with respect to the 5th article, praying "that it might be declared, in the events which had happened, that the Earl assigned, or conveyed and assured, or agreed to assign, convey, and assure to Gwendaline, Princess Borghese, a moiety of the real estate of which he should die seised, and a moiety of his personal estate to which he should be entitled at the time of his death, freed and discharged from all debts due by him, and from all legacies and charges made in his will, or at all events to a moiety of his personal estate, freed and discharged as aforesaid." Answers were put in, and many Italian witnesses were examined on both sides, as to the legal meaning and effect of this 5th article.

There was a \* difference of opinion among them; when \* 627 the causes came on to be heard, these opinions were all submitted to Vice-Chancellor Wood, and the question was whether the word "*depurata*" ought to be applied to "*porzione*," or to "*eredità*." Vice-Chancellor Wood discussed this question in a very elaborate judgment, and decided that the word *depurata* was to be applied to *eredità*, and dismissed the bill so far as it claimed a moiety of the residue free and discharged from debts and legacies. The decree ordered the payment of the two sums of 10,000*l.* each, and declared that the latter of these sums bore interest, "such interest to be calculated from the 9th day of May, 1853, being six calendar months after the death of Earl John." Costs were given to the plaintiff in respect of the payment of these two sums with interest, but, on the claim for the payment of the portion freed from debts and legacies, as to which the bill was dismissed, the plaintiff was ordered to pay costs.

This was an appeal against that decree, and the only questions material for a report were those relating to the manner in which an English Judge was entitled and bound to form his opinion on a case in which the contract itself was a foreign contract to be interpreted according to the foreign law;<sup>1</sup> the award of costs; and the direction as to the payment of interest.

<sup>1</sup> On this point the joint appendix of the parties stated his Honour thus to have expressed himself in the following terms:—

"In the first instance some observations were made, I think rather more by

\* 628     \* *Mr. Rolt* and *Mr. Henry Matthews* (*Mr. Wickens* was with them), for the appellant. — Foreign instruments must

the defendants' counsel than the plaintiff's, upon the extent to which I ought to pay any attention to the parol testimony in this case. Of course, that some parol testimony must be admitted in a case where the instrument is in a foreign language, and where many of the points of the case must depend upon foreign law, cannot be disputed. I think it necessary, therefore, to state, in the outset, what to my mind appears to be the legitimate province of parol and external testimony in a case of this description, and what is left simply for the decision of the Court, independently of such testimony, on the instruments themselves, when to a certain extent their interpretation has been arrived at.

"I apprehend there are these several points to which parol evidence should be addressed. First, it is legitimate, even in English contracts, to ascertain the position of the parties to the contract; and, secondly, the circumstances which attended the execution of the contract. Those are circumstances which we inquire into in our own Courts, as well as, I apprehend, in any Court where jurisdiction is exercised over instruments of any description. The next point to which, in this particular case, it appears to me to be obvious that foreign testimony is properly attributable is, the simple translation of the instrument, with any information that the witnesses can give to me of any grammatical rule of construction peculiar to the Italian language. I limit it to that, because I apprehend that general grammatical rules of construction are open to me whether the instrument be in Italian or Latin, or in any other form of language. I take as an instance that which has been very much pressed here; it is a general rule of grammar, however it may be applied to the particular case before me, namely, as to the question of the adjective referring to the last antecedent substantive, or to the substantive immediately preceding it. That depends on a general rule of grammar which is not at all peculiar to the Italian language, but found in every language of which we have any cognizance. The fourth point upon which parol testimony is absolutely necessary, is to explain any technical words, independently of the language being a foreign language. Of course, to a certain extent, it is in legal language; and every language has its own technicalities with regard to particular arts and sciences. Therefore, it is right to have the evidence of competent witnesses, and to know the meaning of technical words, such as *eredi* and *ereditià* in the case now immediately before me. Fifthly, I must also be informed of the principles of law peculiar to any code with reference to construction. Take, for instance, in this case, the principles asserted of the particular favour shown to dower, which does not exist in our law, but is a peculiarity in the Italian law. It is quite right I should be informed of that by testimony. Then, lastly, and most importantly no doubt, the witnesses are called to depose to the foreign law itself, as applicable to the instrument when it has been translated, and understood, and construed.

"Now all those points are points upon which these gentlemen have been called. They may have gone beyond their sphere in some of their observations upon those points, and I hope I have been able, in reading carefully over the evidence, as I have done two or three times, to separate in my own mind those portions of the evidence which I am bound by, as being testimony to which I

be construed according to the law of the country where they are made. The authorities \* are collected in Story.<sup>1</sup> \* 629 That law is, to an English Judge, a matter of fact which he must receive in \* evidence like any other fact, *Bremer v.* \* 630 *Freeman*; <sup>2</sup> *Bernal v. Bernal*.<sup>3</sup> [THE LORD CHANCELLOR. — There was in that case but one opinion as to the construction of the instrument by the foreign law, so that the Court was under no difficulty there.] Where there is a difference, the English Judge must not take on himself to adjudicate between the conflicting opinions, but must take those which preponderate. In *Dalrymple v. Dalrymple*,<sup>4</sup> Sir W. Scott acted on that principle, which was afterwards adopted in this House in *Yates v. Thomson*.<sup>5</sup> [LORD WENSLEYDALE. — In all the books which speak of foreign law as a matter of evidence, is there any case which says that you may put

must give credence, and on which, if unfortunately it may happen to conflict, I must come to a determination between the conflicting witnesses, and those other portions which are simply observations and arguments, which may be offered by any gentleman of intelligence, such as these witnesses are, and which will be valuable, like other arguments offered to me at the bar, in the course of the discussion of the case.

“On the other hand, I apprehend when this has been done, that is to say, when I have been told what the words mean grammatically, and when I have been told of all the special rules (if any there be) of construction applicable to the language, — when I have had the technical words explained to me, — when I have had the principles peculiar to foreign law, both as to construction and as applicable to the effect of an instrument, detailed before me in evidence, — then it is my province to apply, as far as I can, having had all that information before me, any general rule of grammatical construction which may exist, or any general rule of law which is not peculiar to one code or another, but coextensive with every system of jurisprudence. I may give as an instance, that effect is to be given to every word in a contract, if possible. General principles are within my province. I have, further, to discuss the weight of the testimony, where I am to be guided by testimony, and it is necessary for me to come to a conclusion on the weight of that testimony which is so given.

“I wish to put this clearly, because a case before Lord Cottenham was cited, in which it was said that the Court assumed to itself, even in foreign instruments, the whole province of construction. I take it that is always subject to such limitations as I have here described; namely, limitations which do not leave it open to the Court, otherwise than upon testimony, to form an opinion upon the translation of the language, or the translation of peculiar terms, or the application of peculiar principles of foreign law, whether to construction or to effect.”

<sup>1</sup> Confl. of Laws, § 275, et seq.

<sup>4</sup> 2 Hagg. Cons. 54.

<sup>2</sup> 10 Moore, P. C. 306.

<sup>5</sup> 3 Clark & F. 545.

<sup>3</sup> 3 Mylne & C. 559.



a document into the hand of a witness, and ask what would be the effect of that document in a foreign Court ?] There is no case which lays down that as the rule, but in *Williams v. Williams* that was in fact done.<sup>1</sup> In *Anstruther v. Adair*,<sup>2</sup> the Court gave the same construction to a contract made in a foreign country, as the foreign Court would have given to it. An English Judge cannot be able to determine the construction of a document made under a foreign law, *Nelson v. Bridport*,<sup>3</sup> but must follow that law as proved to him as a fact. [THE LORD CHANCELLOR. — Then why give him the translation of such an instrument ?] The matter \* 681 must be determined by the evidence \* of skilled witnesses, *Sussex Peerage Case*.<sup>4</sup> The deposition of a witness of that kind is alone decisive of the law, *Baron de Bode's Case*,<sup>5</sup> where the matter is very distinctly stated by Mr. Justice Coleridge.<sup>6</sup> [LORD WENSLEYDALE. — Suppose this question put to one of the Roman lawyers, "What is the effect of the 5th article of this contract in the Roman law?" would that be a right question, and must the English Judge be bound by the answer ?] Certainly ; if the evidence was all one way, the Judge must decide accordingly.

If there is a marked difference of opinion, he must do the best he can to find which is the preponderating opinion, but he cannot decide to which the greater value is attached, or that the one is unreasonable and improbable, and the other reasonable and probable. Here the Vice-Chancellor went on the supposition that you may ascertain by evidence, what is the right principle of foreign law to be applied to the contract, that you may give such evidence of the principle of foreign law as shall instruct the Judge in that law, and then he, being imbued with it, may construe the instrument by himself. That was the mistake ; for it was claiming to exercise a judgment on the intrinsic value of the evidence as to what is the foreign law. [LORD BROUGHAM. — Then you contend

<sup>1</sup> *Williams v. Williams*, 3 Beav. 547. "A question arose as to the right of the parties under a Scotch settlement. The Court referred it to the Master to inquire as to its construction according to the law of Scotland. The Master made his report, founded on the opinion of Scotch advocates, and the cause coming on, the Court acted thereon, and ordered accordingly. Mr. Loftus Wigram in support of the petition." The House directed that the Register's book should be examined. See post, 640, et seq.

<sup>2</sup> 2 Mylne & K. 513.

<sup>3</sup> 8 Beav. 527, 534, et seq.

<sup>4</sup> 11 Clark & F. 85, 115, et seq.

<sup>5</sup> 8 Q. B. 208.

<sup>6</sup> 8 Q. B. 265.

that it is not enough to ascertain the principle as a fact, for that the application of the foreign law is as much a question of fact as the law itself.] It is so.

Then as to costs. The suit here was in the nature of an administration suit, and was rendered necessary by doubtful words used by Earl John himself. The costs ought, therefore, to come out of the estate. This is one of the cases described by the Master of the Rolls in \* *Merlin v. Blagrove*; <sup>1</sup> the one being \* 632 where the fund is administered by the Court through the suit of the plaintiff; the other where, though the fund is not administered by the Court, still the Court is of opinion that it is necessary or proper, at the instance of some person, that a declaration should be made determining the rights of parties. In either of these cases, though the bill may be dismissed, the Court will give the plaintiff his costs. The present case is clearly one of the latter class, and the decree was wrong in giving costs against the plaintiff.

The decree was wrong in not giving interest on the 10,000*l.*, payable out of Earl John's estate, from the date of his death. The money, by the very terms of the instrument, becomes payable at that moment, and the interest on it began to run from that time.

*The Solicitor-General (Sir R. Palmer)*, for the respondents.<sup>2</sup>—The question as to the time when payment of interest on the last 10,000*l.* began to run, was not properly presented to the Vice-Chancellor as a substantial matter of claim. Otherwise there would have been no difficulty about it.

As to the costs. The suit here was not necessary as an administration suit. The claim was made by the plaintiff as a creditor. It was unfounded. Instead of assisting, it was an impediment in the way of the administration of the estate. The executors were bound to come in and defend the estate against such a claim. *Merlin v. Blagrove* does not apply here; that was \* 633

<sup>1</sup> 25 Beav. 125, 135, 136.

<sup>2</sup> The Solicitor-General (Sir R. Palmer), Sir H. Cairns, Mr. Giffard, Mr. Dickinson, Mr. Charles Hall, Mr. Badeley, and Mr. Ellison, were for the various respondents, but were not called on to argue the general questions in the case. The Solicitor-General was desired in the first instance to confine himself to the two questions, those of the interest on the 10,000*l.*, and of the costs.

a case of construction where the difficulty was raised by the testator himself, and the suit was necessary to decide it. Here the claim is adverse to his estate, and it has failed. The costs were rightly given in the Court below.

LORD CRANWORTH. — My Lords, the noble and learned Lord upon the Woolsack has intimated to me that, having been concerned, while at the bar, in this case, he wishes to take no part in the decision. [His Lordship having stated the nature of the case, and the decision of the Vice-Chancellor on the construction of the 5th article, said :] —

The first question to be considered is, what are the rules by which an English Court ought to be governed in construing a foreign contract? Where a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance the Court must interpret the contract itself on ordinary principles of construction. [His Lordship then proceeded to construe the article, and went very fully into its terms and their meaning, and said :] —

These considerations seem to me to exhaust the subject, and fully satisfy me that it is the duty of this House to affirm the decree appealed from, so far as regards the rights claimed by the appellants under the 5th clause of the preliminary contract.

It was contended, that in adjudicating upon the subject of \* 634 costs, the Vice-Chancellor had proceeded on an \* erroneous principle, for that the estate of Earl John could not be distributed with safety to his executors and devisees, without such a suit as had been instituted by the appellants, and, therefore, that they ought to have had their costs.

This argument, however, is founded on an incorrect view of the rules which govern the Court of Chancery on such subjects. It is perfectly true, that where a testator has so framed his will as to leave it doubtful who is entitled to his estate, or some part of it, then all costs occasioned by clearing up such doubts must fall on the estate. But here there were no such doubts. The will was clear and unambiguous; and the difficulty arose, not from any act

of the testator, but from the circumstance that the appellant, the Duchess di Sora, after his death, set up an unfounded claim, owing to an erroneous interpretation of an instrument executed by the testator many years before his death, and under which she claimed, and as the Court has shown, wrongfully claimed, a portion of the residuary estate. After the assertion of such a claim the executors could not distribute the testator's estate without the sanction of the Court. But that arose, not from the act of the testator, but from an unfounded claim on the part of the appellants. The principle by which the Vice-Chancellor was guided on the subject of the costs was this: He gave to the appellants the costs of the original suit, so far as related to the claim for dower to which she was entitled, and for obtaining which the original suit was necessary. So far as related to the claim which the appellants had set up, founded on the erroneous construction of the 5th clause, he gave them no costs, and ordered them to pay the costs of Earl Bertram and his representatives, whom they had necessarily made parties solely by reason of their unfounded \* claim. The appellants were not decreed to pay \* 635 any costs of the executors and devisees of Earl John, even so far as related to the claim against his estate in which they failed. Whether the respondents, the executors, might not complain of this as unjust towards them, is not now to be inquired into. Certainly the appellants have no ground of complaint.

The only other ground of complaint is that, by the decree, interest is given on the 10,000*l.* payable on the death of Earl John only from the expiration of six months after his decease, instead of from the day of his death. On this point I think the appellants are right. The English deed expressly stipulates that the principal sum shall be paid on or before the decease of Earl John, with interest at five per cent. per annum from that time.

On this point, therefore, I think that the decree must be varied. But I think that the appellants must pay the costs of the appeal. Had they confined their complaint to this single comparatively unimportant point, I cannot doubt that it would have been yielded; and in a case like this, where the appellants have occasioned very large costs by setting up an unfounded claim to a very large sum, it would be wrong to exonerate them from paying the costs they have occasioned, merely because there is one insignificant matter on which they are entitled to have a variation of the decree.

I therefore move your Lordships, that the decree of the Vice-Chancellor be varied in the mode which I have mentioned as to the date at which interest upon the 10,000*l.* was to be calculated, but that the appellants should pay the costs of the appeal.

I ought to add, that Lord Kingsdown is unable to attend to-day, but has authorised me to say, that he entirely concurs with us in our view of this case.

\* 636     \* LORD CHELMSFORD. — My Lords, this case, in which the evidence fills so large a volume, and which has occupied so many days in hearing the arguments only of the counsel for the appellants, turns upon the construction of one short clause in a written contract executed in a foreign country. Hence has arisen the necessity of having recourse to witnesses skilled in the law of that country, in order to assist the English Judge in his duty of construing the clause in question. This necessity has given rise to a controversy at the bar as to the extent to which the Judge requires and is bound to accept the opinions of these skilled witnesses. The limits within which experts in foreign law (always assuming their credibility) are to be authoritative in cases in which their aid is required, seem never to have been exactly defined. There is no doubt that where the knowledge of the law of a foreign country is necessary for the determination of a case by an English Judge or jury, the only way in which it can be made known to them is, by having it proved as a fact by persons competent to inform them of its existence. So far there is no dispute.

But then it is said on one side, that upon a question of the construction of a contract, the province of the witnesses ought to be confined to giving information as to the law of the country applicable to the case, and as to the sense of words and phrases in the instrument which bear a peculiar or technical meaning, or which, taken together, require a peculiar construction, and that the mind of the Judge will then be sufficiently instructed to enable him to assume the office of construction which properly belongs to him.

On the other side it is contended that the skilled witnesses must be the guides of the Judge, and must lead \* him by the hand throughout ; that they must not only inform his mind as to the law, but must teach him the correct construction

of the instrument itself. It was, however, admitted that in the event of the witnesses differing amongst themselves as to the construction (and which, unless there is an unvarying meaning attached to the word by the foreign tribunals, must frequently be the case), the Judge is remitted to an independent exercise of judgment. But even this admission was qualified by being restricted to cases where the opinions of the witnesses were pretty evenly balanced ; for it was said that where there is a large preponderance of witnesses in favour of one construction, the Judge ought to yield his judgment submissively to the superior number ; and, according to the limited functions which the argument supposes the Judge to possess, it is difficult to understand how he can act differently. For, though it is commonly said that witnesses are to be weighed and not to be numbered, yet if the appellants are right in asserting that in the construction of a foreign instrument the English Judge is utterly incapable of forming a judgment without the help of foreign witnesses, there is no escape for him out of the difficulty of conflicting opinions, but by his adopting the opinion of the majority. Of course when we speak of the construction of a foreign instrument, we must be understood to mean a judicial construction ; because as the instrument must be translated for the English Judge, the translator is an interpreter to him of the meaning of the words employed ; and so far his guide to the intention of the parties.

Now the proof required in this case was what, as a fact, is the foreign law applicable to the part of the instrument to be construed, including in the expression "foreign law," the peculiar meaning (if any) of words and \* phrases used, \* 638 and any established technical construction which the foreign tribunals have applied to a contract of a similar description. The evidence is certainly not of this nature ; at least it is not confined to mere matter of fact as to the foreign law, but is rather a contest of opinions and reasonings of advocates ranged on opposite sides in favour of their conflicting views of the meaning of the instrument to be construed. The office of the Judge would be extremely embarrassing if he were called upon to decide, not upon the ground of testimony, but on the validity of the reasons given by the witnesses in support of their opposite opinions.

But it is difficult to understand how the construction of a contract can be a question of fact. The construction of a contract is

nothing more than the gathering of the intention of the parties to it from the words they have used. If the law applicable to the case has ascribed a peculiar meaning to particular words, the parties using them must be bound to that meaning ; but if there is no such established sense, the intention must be collected in the ordinary manner from the language employed, and we know from experience that different minds often arrive at opposite conclusions of intention from the same expressions. The meaning of a foreign instrument, therefore (cleared of the difficulty of technical terms), cannot be a fact to be proved ; it is at the utmost merely a probable opinion of the witnesses as to the construction which would be likely to be put upon it by the foreign tribunal. And if the Judge is implicitly to receive the opinion of the witnesses, or of the majority of them, they in fact perform his office, and construe the instrument for him.

That the construction must be a matter of judgment on \* 639 the part of the English Judge is admitted by both \* parties, the difference between them (undoubtedly a very wide one) being, whether he is to judge the contract itself, or to judge the opinions of the witnesses upon it. The office of construction of a written instrument, whether foreign or domestic, brought into controversy before our tribunals, properly belongs to the Judge. In the case of a foreign instrument, he necessarily requires some person's assistance. In the first place he must have a translation of the instrument, a translator being (as I have already said) a witness as to the meaning and also the grammatical construction of the words. He must then have the way cleared for him by explanatory evidence, of any words which are of a technical description, or which have a peculiar meaning, different from that which, literally translated into our language, they would bear ; and, if there is any established principle of construction of the particular instrument by the foreign tribunal, proof of it must be given. But the witnesses having supplied the Judge with all these facts, they must retire and leave his sufficiently informed mind to his own proper office, — that of ascertaining for himself the intention of the parties ; or, in other words, of construing the language of the instrument in question.

None of the cases which were cited in the course of the argument appears to me to contradict this view of the duty of the Judge in dealing with foreign law. Lord Langdale, in his able

treatment of the subject in *Lord Nelson v. Lord Bridport*,<sup>1</sup> nowhere places the foreign witness in the position of the Judge, though he expresses an opinion that the Judge may sometimes be compelled to undertake the office of a witness, and ascertain for himself the fact of the foreign law "if there should be \* a variance \* 640 or want of clearness on the testimony." And Lord Stowell appears to have assumed this office in *Lindo v. Belisario*,<sup>2</sup> and *Dalrymple v. Dalrymple*,<sup>3</sup> and the Judicial Committee did the same more recently in the case of *Bremer v. Freeman*.<sup>4</sup>

It seems, however, rather questionable whether the Judge has a right to resort to the foreign law itself for information, when the evidence of the witnesses is not satisfactory to his mind. The witnesses are at liberty to adduce, in support or confirmation of their testimony, text books, decisions of the foreign Courts, or rather authorities, which, becoming a part of their evidence, may enable the Judge to form his own opinion upon the particular text of foreign law thus laid before him. But it seems contrary to the nature of the proof required in these cases, that the Judge should be at liberty to search for himself into the sources of knowledge from which the witnesses have drawn, and produce for himself the fact which is required to be proved as a part of the case before him. As my noble and learned friend, Lord Brougham, said in the *Sussex Peerage Case*,<sup>5</sup> "the Judge has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it."

Whatever may be thought, however, of the degree of assistance required by the Judge in ascertaining what is the foreign law, there is no authority for depriving him of an independent judgment in the ultimate construction of a foreign instrument. In the short report of the case of *Williams v. Williams*,<sup>6</sup> it is said, "A question arose \* as to the right of the parties under a \* 641 Scottish settlement. The Court referred it to the Master to inquire as to its construction according to the law of Scotland." This is inaccurate. The Registrar's book has been searched, and it appears that the inquiry was not as to the construction of the settlement, but "what, according to the law of Scotland, were the rights and interests of the parties under the settlement." So in

<sup>1</sup> 8 Beav. 527.

<sup>2</sup> 1 Hagg. Cons. 216, and Appx. p. 7.

<sup>3</sup> 2 Hagg. Cons. 54.

<sup>4</sup> 10 Moore, P. C. 306.

<sup>5</sup> 11 Clark & F. 115.

<sup>6</sup> 3 Beav. 547.



*Anstruther v. Adair*,<sup>1</sup> the Lord Chancellor said he should make a declaration that the law of Scotland ought to govern the construction of the contract, and referred it to the Master to inquire and state whether, under the contract so construed, the plaintiff was entitled to receive a transfer of the stock to himself. The meaning of that appears to be that the Lord Chancellor thought that the law of Scotland was to be applied to the contract, and held that by that law the husband was entitled to all the property of the wife coming to her after the coverture, without his being compelled to make a settlement upon the wife, as he would be if the case had to be decided by the English law.

The extent to which evidence as to the construction of foreign instruments is admissible is thus explained by Lord Mansfield in *Mostyn v. Fabrigas*:<sup>2</sup> "If there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is, as evidence is received of customs in respect of trade." So, in this case, it was quite legitimate evidence to show (what it was said no English

lawyer could properly appreciate) the importance of the  
\* 642 title of dower, and the favour shown to it by the \* Roman law, and that by that law the conferring a *dos* is imperative upon a father on his daughter's marriage. So, as to the irrevocability of the provision once made, and as to the institution of an heir, and as to any peculiar meaning which attaches to the words "*credita libera*," "*legati*," or any other technical expressions in the clause to be construed. All this evidence was legitimately offered in aid of the construction, but all this assistance having been rendered by the witnesses, their office was at an end, and the Judge was entitled then to enter upon his own peculiar duty of construing the clause, according to the intention of the parties. [His Lordship then delivered his opinion on the construction of the 5th article, entirely in accordance with that of Lord Cranworth.]

LORD WENSLEYDALE. — My Lords, I did not hear the argument in this case, and of course abstain from giving any opinion on it ; but I cannot help regretting that my noble and learned friend upon the Woolsack has refrained from favouring us with his opinion upon the subject. He has so refrained from motives of delicacy, but I apprehend it is contrary to the rules of this House, that a

<sup>1</sup> 2 Mylne & K. 513.

<sup>2</sup> Cowp. 174.

Peer who has heard the argument should abstain from giving his opinion upon the ground stated. I think it ought not to be drawn into a precedent.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, I concur thus much in the observation which has been made by my noble and learned friend with regard to the propriety of the course which I have taken, that I think it ought not to be considered as the \* rule in this House that the Lord Chancellor, \* 643 or any other noble and learned Lord, should abstain from taking part in the decision because he may have been counsel in the case in the Court below. But at the same time I may say, in explanation of the course which I have taken, that I thought it my duty to preside in the argument, and to give to the appellants' counsel a mind as impartial and as free from former impressions as I could possibly command. I did so because if, upon hearing the argument in this case, I had been convinced that the decree was wrong, it would have been my duty to give the appellants the benefit of that conviction. But after hearing the argument on behalf of the appellants, not being able to arrive at that conclusion, and having regard to the circumstance that the appellants are strangers, foreigners, who might possibly misapprehend the rules of proceeding in this House, I thought it more becoming, as it was more acceptable to my own mind, to take no part whatever, either openly or secretly, directly or indirectly, in the judgment which has been given in this case.

LORD CHELMSFORD. — My Lords, I entirely agree with my noble and learned friend in the propriety of the course which he has adopted. It was exactly the one which I pursued in the *Thellusson Case*.<sup>1</sup> I attended here as Lord Chancellor, and presided at the hearing of the case, determining not to take any part in the decision unless there should be unhappily a division of opinion amongst the noble and learned Lords who were present upon that occasion. It happened, most fortunately, that they were unanimous \* in the opinion which they expressed. And I \* 644 felt it to be my duty, under those peculiar circumstances, from a feeling of delicacy, which I hope will always be found to exist in such cases, to refrain from expressing any opinion.

<sup>1</sup> 7 H. L. Cas. 429.

LORD CRANWORTH concurred, and thought that the noble and learned Lord on the Woolsack had exercised a very wise discretion in this matter.

It was ordered, that the decree of the Court of Chancery of 23d November, 1860, be varied by declaring that the interest on the 10,000*l.* be computed from the 9th November, 1852 (the day of the death of the Earl), instead of the 9th May, 1853 (six months after such death), and, with this variation, that it be affirmed; that the appellant do pay to the respondents the costs of the appeal, and that the cause be remitted to the Court of Chancery to do therein as shall be consistent with this variation and judgment.

Lords' Journals, 28th July, 1863.

1864. February 11.

EDWARD S. POWER, *Appellant*.

FRANCIS C. REEVES, *Respondent*.

*Landed Estates Court, Conveyances by. Finality of. Delay in Appeal. 21 & 22 Vict. c. 72. Costs.*

A conveyance made under 21 & 22 Vict. c. 72 ("Sale and Transfer of Lands, Ireland") is, by § 85, "for all purposes conclusive evidence" that all previous proceedings leading to such conveyance have been regularly taken.

Where, therefore, proceedings had been taken for the sale of certain estates, and their sale and resale had been directed in a manner which, when presented to the notice of this House, was declared to be marked with great irregularity, but the party complaining had not brought the matter before the Court of Appeal until after the conveyances had been executed, it was held that this House was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities.

When the appellant did go before the Court of Appeal his petition was dismissed with costs. The House reversed the order for costs, but affirmed the dismissal of the appeal.

THIS was an appeal against an order of the Court of Appeal in Chancery in Ireland, confirming two orders of the Landed Estates

Court there, dated respectively 3d and 31st May, 1860. The orders were made in respect of a sale of the appellant's estates, directed upon the petition of F. Carleton Reeves, one of the appellant's creditors. The first order, though made on the 3d May, was not formally drawn up till 30th June. It was then put into writing in the following form: "The sale of the estates in this matter having come on this day, and it appearing that Mr. W. C. Waldron was declared the purchaser of lots 1, 2, 5, 6, and 9, on the rental, and on being questioned, the said W. C. Waldron declared that he had bid for said lots in trust for the owner, and also that he was not a solicitor; and lots 3, 4, and 7 having been put up for sale, the said W. C. Waldron also bid for the same, but other parties were declared the purchasers, the said W. C. Waldron having been the next highest bidder for each of said lots \* respectively; and it further appearing to the Court \* 646 that said biddings so made by the said W. C. Waldron, were not *bonâ fide*, and inasmuch as the encumbrances affecting said estates exceeded the amount of the said bidding: It is declared by the Court, that the sales of the said lots 1, 2, 5, 6, and 9, so made to the said W. C. Waldron, be and the same are hereby cancelled: and the purchasers of said lots 3, 4, and 7, so desiring it, and it appearing to the Court, under the circumstances, just and reasonable that said bidding for said lots 3, 4, and 7, should not be enforced: it is further declared, that the said sales of lots 3, 4, and 7 be, and they are hereby cancelled; and it is ordered that the solicitor having the carriage of the proceedings, do proceed to advertise the said estates for sale; and that the said sale do take place on Thursday the 31st day of May instant, with liberty to the owner in the mean time to bring in and lodge in Court the full amount of the several sums so bid by him for said lots 1, 2, 5, 6, and 9 respectively, and thereupon to make such application to the Court, to be declared the purchaser thereof by private sale, as he may be advised." Two lots, 8 and 10, were not sold at all. On the 31st May the resale took place, according to the practice in such matters, in the presence of one of the Judges of the Landed Estates Court, Mr. Justice Dobbs, who pronounced an order which was never formally drawn up, but which, it was not disputed, was rightly set forth in the appellant's appeal to the Court of Chancery, in the following terms: "I will proceed with the sale of the entire estates in this matter, without any

regard to the sales which were had on the 3d of May, and which have been cancelled ; and I will not suffer the owner (the appellant) to bid for any portion of his estates, on the ground that he is now in contempt of Court, for his conduct in bidding  
 \* 647 through a \* person who was not a solicitor, and not himself responsible to make good the purchase on the 3d of May last ; and if any one but an officer of the Court, being a solicitor and a solvent person, responsible to pay in the purchase money, shall bid as a trustee for any one, he will be guilty of a contempt of Court, and attached ; and in order to carry out this rule, I shall, on this occasion, deviate from the usual course, by requiring the purchaser to sign the sale book immediately after the sale of each lot, instead of waiting until the sales are over." The sales proceeded accordingly.

In the month of June an application was made to the Landed Estates Court to set aside these sales, and affidavits were put in on behalf of the appellant. Mr. W. C. Waldron made an affidavit, stating that he had attended at the sale on the 3d of May, and made biddings for the owner at his express desire ; that after the sale was over, and when he had signed the entry of the first lot in the Court book, the Judge was brought back into Court, and asked him whether he was not aware that there was a rule of Court against an owner purchasing his own estate without having first obtained the leave of the Court so to do, and he answered that he was not aware of the existence of any such rule ; that on the 7th of May a notice was, by order of the Judge, served on deponent (which he duly transmitted to the appellant), stating that the resale had been fixed for the 31st of May, but that in the mean time the owner would be at liberty, on lodging the purchase money for the lots 1, 2, 5, 6, and 9, to make any application he might think fit ; that on the 31st May the resale took place ; it was insisted before the Judge that the sale of the other lots was complete, and that he had only authority to sell the adjourned lots 8 and 10, but  
 his Lordship made the declaration (now treated as the  
 \* 648 \* order) of 31st May, and sold the whole of the lots at a loss to the estate of 2420l.

The appellant, on the 27th June, made an affidavit affirming these various statements. On the same day, notice was given of a motion to be made before Judge Dobbs to direct a conveyance to be executed to the appellant for all the lots purchased on his be-

half on the 3d of May. This notice was served on the various purchasers at the resale. On the 30th June counsel appeared in Court, to move in accordance with this notice, but Mr. Justice Dobbs refused to hear him, on the ground that Waldron was in contempt in having bid through a person not a solicitor, and not having lodged his purchase money in accordance with the directions contained in the notice of the 7th May. Conveyances were made under the authority of the Court.<sup>1</sup>

On the 2d August, 1860, a petition of appeal was presented to the Court of Appeal in Chancery in Ireland, against the orders of the 3d and 31st May, and notice of this appeal was served on all the persons who had been purchasers at the resale. The purchasers did not appear, but the person "having the carriage of the sale" appeared, and resisted the appeal. On the 10th of November the Court of Appeal pronounced an order confirming the two orders. The present appeal was then brought.

*Mr. Isaac Butt* (of the Irish bar) and *Sir Hugh Cairns* (*Mr. Bond Coxe* and *Mr. Hume Williams* were with them), for the appellants. — All proper parties had notice of this appeal. The appellant \* has no power to force them to come in, but \* 649 their absence does not affect his right to have the appeal heard. The two orders must be reversed. They assume a power which the Judge did not possess. [LORD CRANWORTH, referring to the 85th section of the statute,<sup>2</sup> said: When a conveyance has once been made to the purchaser, can any question be afterwards

<sup>1</sup> There was no statement in any one of the papers of the date or dates of these conveyances. In the respondent's answer to the petition of appeal lodged on the 2d August, 1860, it is merely said that the lots "have been sold, and conveyances thereof executed to the purchasers."

<sup>2</sup> 21 & 22 Vict. c. 72, § 85. "Every conveyance, assignment, and declaration, respectively executed as required by this Act, and every order for partition or for exchange, or for division and allotment, made by the Court under its seal, shall, for all purposes, be conclusive evidence that every application, proceeding, consent, and act whatsoever, which ought to have been made, given, and done previously to the execution of such conveyance, assignment, or declaration, or the making of such order respectively, has been made, given, and done by the person authorised to make, give, and do the same; and no such conveyance, assignment, declaration, or order shall be impeached by reason of any informality therein; and every such order shall operate and may be registered in the office for registering deeds in Ireland, in like manner as of conveyance by way of partition, exchange, division, or allotment, had been executed for such purposes."

raised ?] It would be strange to say that it could not. The Judge would then have power to stop any appeal by at once executing a conveyance. Here the very foundation of the order of 3d May was erroneous. By that order the sale is cancelled, because Waldron, though not a solicitor, made biddings for the appellant. He had a right to do so. The 57th section expressly authorises "any person interested in the land, other than the encumbrancer or owner, on whose application the sale has been ordered, or the person having the carriage of the sale," to bid thereat. The appellant did not fill any one of these excepted characters, and so was entitled to bid. A conveyance executed on a sale wrongfully ordered, cannot override a sale made on a lawful bidding. The Judge himself, by his notice of the 7th May, must be taken to have admitted that his order of the 3d of May was wrong. By

\* 650 that notice he permitted \* the appellant to bring in the money on the very sales which, by his order, he had already declared to be cancelled. The Court would not hear the application argued in June, but confirmed the orders of May, on the ground that the appellant was in contempt by bidding at the sale through Waldron. But he was not in contempt, for he had only done that which the statute expressly permitted him to do.

The rights of the purchasers cannot be treated as a bar to this appeal. Their rights must be tried before another tribunal, and not before the Landed Estates Court. If the conveyance is conclusive, they would be effectively protected. But so long as these orders stand, no question whatever can be raised as to their rights. These orders having been confirmed, however erroneously, by the Court of Appeal in Chancery in Ireland, can only be now brought into discussion by an appeal to this House. [THE LORD CHANCELLOR. — Was what was done on the 30th June carried to the Appeal Court ?] It was not.

No counsel appeared for the respondent.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this is an appeal presented against an order made on the 10th November by the Court of Appeal in Ireland, dismissing a petition by which two orders of the Encumbered Estates Court, dated the 8d of May and the 31st of May, were impeached as improper and irregular.

The order of the 3d of May is material. [His Lordship read it, see *ante*, p. 645.]

The material part of the order with which your Lordships on the present occasion have the greatest concern, is that part which directs a resale. A resale of the \*estates accord- \* 651  
ingly took place under and by virtue of this order, the present appellant having declined to avail himself of the opportunity which was offered to him of bringing in the sums of money that he had bid for the lots, and making an application to the Court to be declared the purchaser by private contract.

It appears that no appeal to the Appeal Court was attempted to be presented by the owner, or any step taken for that purpose until after the resale. The resale accordingly took place on the 31st of May, and upon that occasion contracts were entered into by the Court with different purchasers, which contracts have since been completed, and conveyances made to those purchasers in pursuance of those contracts.

My Lords, the order that was made upon the 31st of May appears to have been made in a very irregular form. It is stated in these words, adopting the language of the Judge. [His Lordship read it, see *ante*, p. 646.] So much of what is here represented to have been said by the learned Judge (but in which representation I trust that there is some material error) forms in effect the order that was made.

In consequence of that order, as I have already observed, a resale was effected, and certain contracts were entered into with the purchasers, which contracts were afterwards carried into effect by conveyances. And although as to some of them it does not very clearly appear, yet as to the major part it does appear, that these contracts were completed by conveyances anterior to the 2d of August, 1860. On that day a petition of appeal against these proceedings was presented by the present appellant to the Court of Appeal in Ireland. There is certainly, if the appellant's representation be correct, a picture of great irregularity drawn in the course of these \*anterior proceedings. And it must \* 652  
be understood that the conclusion, which I think your Lordships will find yourselves compelled to arrive at, is a conclusion that will rest upon your inability to give any relief, and must not be considered as involving a sanction or affirmance of some of the irregularities in those anterior proceedings. But I desire particu-



larly to point out that if there was any available mode of correcting these irregularities, that mode should have been resorted to with diligence by the appellant, and that he ought not to have postponed his application to the Appeal Court until after the transaction had been made irrevocable by the completion of the conveyances to the purchasers.

We are asked and pressed by the counsel at the bar to reverse those orders which, in effect, did set aside the contracts that the appellant represents himself to have entered into with the Court, and direct a resale, under which resale the estate was sold by the Court to other and different persons. If this House proceeded to do so, it would undoubtedly have to determine a question in which the purchasers (whose introduction into the Court, and whose acceptance by the Court as purchasers, depend altogether upon the orders of the 3d of May and of the 31st of May) have a most material interest. And it is avowed by the counsel for the appellant, that the ruling object of coming to your Lordships' House to set aside those orders is, that that may be taken out of the way which, if it remains, will be a barrier to the appellant's instituting proceedings against the purchasers. The appellant therefore appears to have stood by until the purchasers, by receiving their conveyances, had acquired an interest in these orders; and not only had acquired an interest in the orders, but had acquired a title to these

estates, which, by force of the wholesome provisions contained \* 653 \* in the Statute of the 21 & 22 Vict. c. 72, cannot be now impugned or affected by any proceedings. It is material also to notice, that this was so much felt by the present appellant, that when he presented his petition of appeal to the Court of Appeal, he served that petition of appeal upon the different purchasers. It does not appear that any of those purchasers appeared at the hearing, and I think they were rightly advised not to do so, because they relied upon the conveyances which they had obtained. But the Court of Appeal was of opinion that, inasmuch as their title had become irrefragable under the statute, it was impossible to reopen the question of the propriety of the orders of the 3d and of the 31st of May, those orders having, in point of fact, been steps only to further proceedings, which had now become wholly irrefragable and unassailable, and that therefore the antecedent steps could no longer be questioned.

I think, therefore, that your Lordships will concur with the

Court below, and say that upon the whole, this was, under the circumstances, a very correct conclusion, and that it would be a very inexpedient and unfortunate thing to allow any door to be opened by which a title completed under those statutes which created the Encumbered Estates Court could be at all impeached or assailed. My Lords, I will however point out to you that the orders in question may be divisible into two parts ; that is, they may be regarded first, so far as they serve as a basis for the purchaser's title and the purchaser's rights, in which respect I hope your Lordships will be of opinion that they cannot admit of being questioned or impugned. But there is another aspect of the orders in which they may be regarded, so far as they affect the appellant personally, in casting, to a certain extent, an imputation upon the appellant's honour.

\* And although it is impossible to reverse the orders, for the \* 654 reasons I have given, yet, inasmuch as I think your Lordships will be of opinion, that there was some incorrectness in the mode of dealing with the appellant in the making of those orders, I think it would have been better if the Court of Appeal, while refusing to interfere by reason of the completed title of third parties, had not affirmed the whole of what had been done, in such an unequivocal manner, as it would appear to have been affirmed, by dismissing the appeal of the appellant with costs. I shall therefore humbly make this suggestion to your Lordships, in which I trust you will agree with me, that although we are bound by reason of the rights and interests of absent parties, by reason of those orders having now become irrevocable and irreversible in consequence of the conveyances having been made, to which they are in truth the introduction and the steps, yet it would have been better if that petition had been dismissed without costs. And to that extent I would submit to your Lordships that we might now amend the order. Therefore, I humbly move your Lordships, that so much of the order of the Court of Appeal as directed the appellant to pay the costs of the application should be reversed, but that in all other respects the prayer of the present petition of appeal be refused, and the appeal dismissed.

LORD CRANWORTH. — My Lords, I entirely concur in the motion which has been made by my noble and learned friend. I believe that all your Lordships feel for this appellant, because undoubtedly something like injustice seems to have been done towards him.

The effect of the course that was taken has been to deprive him of what he thinks to be his right. But I think it is essential

\* 655 that we should \* adhere strictly to the provision of the statute, which makes a conveyance under an order of the Encumbered Estates Court absolute and conclusive. In truth, the petitioner was not without remedy, because if he had appealed to the Court of Appeal immediately after the order of the 3d of May, or even immediately after the order of the 31st of May, perhaps he might have obtained relief. As it is, I think we are unable to grant any other relief than that which has been proposed by my noble and learned friend.

LORD CHELMSFORD. — My Lords, I entirely agree with my noble and learned friends, and I have nothing to add to what they have said.

It was ordered, that so much of the said order of the Court of Appeal in Chancery in Ireland, of the 10th of November, 1860, as ordered that the two deposits of 10*l.* each be paid over to Reeves, in part payment of his costs of the appeal, and as further ordered that the said Francis Charleton Reeves be at liberty to apply to the Court below for payment of the residue of the said costs, be, and the same is hereby reversed ; but that in all other respects the appeal be, and the same is hereby dismissed this House ; and the cause is remitted, &c.

Lords' Journals, 11th February, 1864.

## \* BECTIVE v. HODGSON.

\* 656

1864. March 3, 4.

The COUNTESS of BECTIVE, *Appellant*.KIRKMAN D. HODGSON and others, *Respondents*.

*Will. Residue. Real and Personal Estate. Intermediate Income.*  
*Variation in Decree. Costs. Practice.*

Where, for the purpose of a disposition in a will, real estate is directed to be converted into money, or money to be converted into real estate, and the disposition fails, though the conversion has actually taken place, the real estate, or the money, will retain its original character for the purpose of ascertaining the ownership of it.

The rules which are applicable to the gift of a residue are applicable to the parts into which that residue may be divided.

T. by his will devised his real estates to trustees, on trusts, one of which was a disposition, good as an executory devise, which could not take effect until the death of his daughter. He directed the residue of his personal estate to be divided into three equal parts, and gave the same to his trustees (who were also his executors) on trust to invest two third parts in the purchase of real estate to be settled to the same purposes as those directed as to his original real estates, — the other third to be also invested in the purchase of real estate to be conveyed to the use of a person then in being : —

*Held*, that the intermediate income of these two thirds was not undisposed of by the will, but must be laid out in the purchase of real estate, according to the directions in the will, until such time as some person should be entitled to possession under the limitations declared by the will, so far at least as not to exceed the period allowed by law for accumulation.

*Hopkins v. Hopkins*, Cas. temp. Talb. 45, 51, explained and corrected.

Under the particular circumstances of this case, the costs of all parties were ordered to come out of the general personal estate.

Though an appeal is only against part of a decree, yet, all parties having had notice, the House will not make a partial order, so as to enable those who did not join in the first, to bring another appeal.

THIS was an appeal against a decree of Vice-Chancellor Wood. William Thompson, Esq., of Underley Hall, in the county of Westmoreland, made his will, dated 2d March, 1853, by which he gave to his trustees (whom he afterwards appointed his executors), their heirs and assigns, all his lands in Kirkby Lonsdale, and Mansergh \* to the use of Amelia his wife, for life, re- \* 657  
 mainder to trustees, &c. during the life of his daughter,

the Countess of Bective, upon trusts to pay her the rents for her life. And from and after the decease of the Countess, to the use of each of the sons of the Countess who should be born in the testator's lifetime (except Lord Kenlis, the testator's grandson and first son of the Countess, or her eldest son for the time being, being the heir apparent of the Earl of Bective) successively for life, with remainder to the first and other sons of each (except as aforesaid), successively in tail male, remainder to the sons born after the testator's death, and their sons successively in tail male, remainder to Lord Kenlis for life; to his first and other sons successively in tail male, with divers remainders over, and an ultimate remainder to the testator's own right heirs. There were then provisions for maintenance during infancy, and the will went on thus: And as to the residue of his real estates, and all his chattels real, he gave the same unto his trustees, their heirs, &c. to and for the trusts and subject to the powers, &c. thereinbefore expressed, to take effect after the deaths of his wife and daughter, of and concerning his real estates K. and M. Provided that no one who should take an estate tail, by purchase, in the chattels real should be entitled thereto until twenty-one, or, dying before that age, should leave issue inheritable. And as to the residue of his personal estate, subject to the payment of his debts and legacies, &c. he gave the same to his trustees, their executors, administrators, and assigns, in trust, with all convenient speed after his decease, to sell and convert the same into money, and in the mean time and until his residuary personal estate, or the proceeds thereof, should be invested in the purchase of real estate as thereafter directed, to lay out and invest the moneys in the

\* 658 funds, \* and apply the interest, dividends, and annual produce of such residue in the same way as the rents and profits of the real estates, in the purchase of which the said residue was directed to be invested, would be payable. And he directed his trustees to lay out and invest two equal third parts of the residue of his personal estate in the purchase of freehold or copyhold lands of inheritance, and to settle the same to the same uses and trusts as were expressed to take effect after the deaths of his wife and daughter, concerning the real estates before devised. And as to the remaining third, to purchase freehold or copyhold land of inheritance, and to settle the same for the use of Lord Kenlis, the first son of his daughter, for life, with remainder to his first and

other sons in tail male, with a proviso for determining such estates in hereditaments purchased with the one third, if Lord Kenlis, or his issue, should become entitled to the rents of the estates purchased with the two thirds.

The testator died 10th March, 1854, leaving his wife and Lady Bective him surviving. Lady Bective had but one son, Lord Kenlis. Mrs. Thompson died 7th September, 1861. The accumulations of the personal estate, which were very considerable, had been duly invested.

On the 11th October, 1862, the trustees filed their bill in Chancery against the Earl and Countess of Bective and Lord Kenlis (an infant), stating that the Earl and Countess alleged that until the birth of a younger son, or, if no such younger son should be born, then during the Countess's life, the annual income of the testator's residuary real estates and of the two equal third parts of her personal estate, was undisposed of by his will, and belonged to the Countess as his heiress at law and next of kin, and the bill prayed for the direction of the Court therein. The defendants put in answers, and the cause \* was heard before Vice- \* 659 Chancellor Wood, who, on the 27th May, 1863, made a decree declaring the Countess entitled to the rents and profits of the testator's residuary real estates, until such time as such estates should vest beneficially in some person entitled thereto in possession, upon the trusts to take effect after the decease of the testator's widow and daughter; and that the interim income of the testator's chattels real, until such time as the said estates should vest as aforesaid, fell into the general residue of the testator's personal estate; and that two third parts of the residuary personal estate, including the income arising from such two third parts, until the time when some person should be entitled in possession under the limitations in the will to the income of the real estate directed to be purchased with such two third parts, ought to be laid out in the purchase of such estates accordingly; and that there was no intestacy in respect of the two third parts of such income.<sup>1</sup> The appeal was against so much of the decree as directed the income of the two third parts of the residuary personal estate to be laid out in the purchase of real estates, and declared that such income was not undisposed of.

<sup>1</sup> 1 Hem. & Mil. 376.

*The Attorney-General (Sir R. Palmer) and Mr. Hobhouse (Mr. Burrell and Mr. F. V. Hawkins were with them), for the appellant. — The limitations and trusts declared by the will contain no disposition of this income during the period of suspense in the vesting occasioned by the continuance of the life of the Countess of Bective. As Lord Chancellor Talbot said in *Hopkins v. Hopkins*,<sup>1</sup> “until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir at*

\* 660 *law, \* the case being the same when the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir at law. So it was held by Lord King in the case of *Hertford v. Weymouth*, which shows that equity follows the law.” The same rule was expressly recognised and applied by Lord Chancellor Sugden in *Wills v. Wills*,<sup>2</sup> even though there were general provisions in that will for accumulation. And in *Gibson v. Montfort*,<sup>3</sup> Lord Hardwicke expressly recognised and adopted the doctrine in *Hopkins v. Hopkins*, that the surplus being undisposed of went to the heir at law. This rule is not rendered inapplicable by any declared intention of the testator. There is no intention shown to accumulate these intermediate rents and profits. The residue, which means the entirety of the residue, is to be divided into three parts, one of which goes to a person who would immediately come into possession; the other two parts are to be laid out in the purchase of real estate, which cannot vest till a future time. The intermediate income is undisposed of, and goes to the Countess as heir. [THE LORD CHANCELLOR. — There are two thirds of the personalty given as residue. Does not the bequest of personal estate always carry the income with it?] If there is a gift of personal estate on a contingency, the intermediate interest would fall into the residue, *Wyndham v. Wyndham*;<sup>4</sup> *Shaw v. Cunliffe*;<sup>5</sup> *Bridgwater v. Egerton*;<sup>6</sup> *Harris v. Lloyd*.<sup>7</sup> But here there is no gift of residue properly so called. Residue is an entirety. Two third parts of residue are not residue in law,*

<sup>1</sup> Cas. temp. Talb. 44, 51.

<sup>2</sup> 1 Drury & War. 439.

<sup>3</sup> 1 Vez. Sen. 485, 492.

<sup>4</sup> 3 Brown, Ch. 58. See *Thruston v. Anstey*, 27 Beav. 335.

<sup>5</sup> 4 Brown, Ch. 144.

<sup>6</sup> 2 Vez. Sen. 122.

<sup>7</sup> Turner & R. 310.

but are \* the subject of a particular trust, and to them \* 661 cannot be attributed the qualities of an entire residue, for they constitute a particular fund, which has been obtained by separation from the residue, and which is here directed to be converted into real estate. [THE LORD CHANCELLOR. — Can it be material whether the gift of the residue is to A. or to A. B. C. D. E. and F. ?] It might not be material so long as the gifts retained the particular character of residue. But that is not so under such circumstances as exist here. Where there is such a division of residue into parts, on failure of any one of the gifts, that part will not again become residue, *Skrymsher v. Northcote*.<sup>1</sup>

In *Cresswell v. Cheslyn*,<sup>2</sup> the testator gave the residue of his personal estate to three of his children, A. B. and C. By a codicil he revoked this gift as to C., giving her a pecuniary legacy instead, and it was held that this third did not belong to the other two, but went according to the Statute of Distributions. In *Humble v. Shore*,<sup>3</sup> the testatrix's residuary real and personal estate was to be sold, and there was a gift to trustees of one sixth for S. W. That was revoked by a codicil, and the same one sixth was given to trustees for S. W. for life, with a direction after her decease to pay a legacy thereout, and that the remainder of such sixth should sink into the residue of the personal estate, and be disposed of accordingly. S. W. died before the testatrix: the sixth was held to be undisposed of, and went to the heir at law and next of kin.

The heir at law takes here on account of the conversion of the property. The will operates an actual conversion from the moment of the death; and on the death that real estate, which is not disposed of, is cast by law \* upon the heir at \* 662 law, *Griffith v. Ricketts*,<sup>4</sup> when Vice-Chancellor Wigram said: "The will speaks from the death of the testator, and whatever is deemed real estate at the time of his death, *prima facie* belongs to his heir. A contemporaneous declaration that his real estate shall be turned into personalty may alter the character of the property which the heir at law takes; but, unless it is given away from the heir, there is no reason why he should not take it, although the trusts of the will may oblige him to take it as per-

<sup>1</sup> 1 Swanst. 566, 570.

<sup>2</sup> 2 Eden, 123, 3 Brown, P. C. 246.

<sup>3</sup> 7 Hare, 247.

<sup>4</sup> 7 Hare, 299, 311.



sonal estate, and not as real estate"; *Clarke v. Franklin*<sup>1</sup> is to the same effect; and in *Smith v. Claxton*<sup>2</sup> it had been previously held, that if all the purposes of an intended conversion failed, the conversion failed, and the heir would take such unconverted estate as land, but that if there was only a partial failure, the heir at law would receive the benefit of such partial failure, and take the property as money, and not as land; *Bagster v. Fackerell*<sup>3</sup> is to the same effect. [THE LORD CHANCELLOR. — Conversion is for the purposes of the will; but if they fail, the quality of the property of course is not changed.]

The cases relied on by the other side are *Green v. Ekins*,<sup>4</sup> which, however, laid down no new doctrine, for Lord Talbot himself had previously stated the same rule in *Studholme v. Hodgson*,<sup>5</sup> nor does it justify the present decision, but is on the whole adverse to it. In *Green v. Ekins* the testator was a person who had been twice married; by his first wife he had a daughter, who had married without his consent. By his second wife he also had a daughter then an infant. He gave directions for carrying on his trade for the benefit of those who should be entitled to the residue \* 663 \* of his estate; he gave all the residue of his personal estate to his son (if he should have one), at twenty-one; but if he should have no son, then to his infant daughter at twenty-one, or marriage; but if she should die, and there should be no other child, then to such son of his first daughter as should attain twenty-one; but if she should not have a son, to W. Ekins Pier, subject to the payment of 4000*l.* to the daughter of this daughter. It was held that this income was to accumulate, and form part of the residue till the devise to the son vested; and Lord Hardwicke then said, "There is a great difference between a particular distinct part of the personal estate, and the whole residue of it; for when the whole is given, it is a contradiction in terms to say any part of that estate is undisposed." Here the whole is not given, but is expressly divided into distinct parts, and appropriated to distinct purposes. That being so, they are, on the authority of that case itself, to be differently treated.

The intermediate profits of the residue of personalty accumulate; those of the residue of realty go to the heir at law, *Trevanion*

<sup>1</sup> 4 Kay & J. 257.

<sup>2</sup> 2 Atk. 473.

<sup>3</sup> 4 Madd. 484.

<sup>4</sup> 3 P. Wms. 299.

<sup>5</sup> 26 Beav. 469.

v. *Vivian*.<sup>1</sup> When indeed the two are blended in one common mass, the intermediate rents of realty may pass under the gift of residue in the same manner as do the profits of the personalty, *Genery v. Fitzgerald*,<sup>2</sup> *Glanvill v. Glanvill*;<sup>3</sup> but that is not the case here, nor is it easy to reconcile those two cases with *Bullock v. Stones*.<sup>4</sup>

*Mr. Rolt* and *Mr. Wickens* appeared for the respondent Hodgson; *Sir H. Cairns*, *Mr. Markham Giffard*, and *Mr. Erskine*, for Lord Kenlis.

At the conclusion of the argument on behalf of the appellant, —

\* THE LORD CHANCELLOR (LORD WESTBURY) said: Mr. \* 664 Rolt, a point has suggested itself to the House which has not been noticed at the bar. You will observe that the decree directs the income of the two third parts to be invested until the time when some person shall be entitled in possession under the limitations of the real estate. The effect of that might be to direct accumulation for more than twenty years. The accumulation thus in effect ordered by the direction to lay out the income from year to year, ought, as we at present think, to be limited to the period allowed by law for accumulation, and then, if it should so happen that the property does not vest during the twenty years, and the Countess shall outlive the twenty years, then the Countess, as next of kin, will become entitled to the income of the residue directed to be invested. Have you any objection to that?

*Mr. Rolt* and *Mr. Giffard* answered that they had not any objection. It was a mere oversight in drawing up the decree.

THE LORD CHANCELLOR. — I thought so. [His Lordship then stated the verbal alterations he proposed to make in the decree. See the order, *post*, 671, and added :] —

My Lords, notwithstanding the ingenious and elaborate arguments which have been addressed to you on the part of the appellants, I think you will agree with me that this case is clearly governed by rules which have been very long established. My

<sup>1</sup> 2 Vez. Sen. 430.

<sup>2</sup> Jacob, 468.

<sup>3</sup> 2 Mer. 38.

<sup>4</sup> 2 Vez. Sen. 521.

Lords, it is an indisputable rule of law, that if a freehold estate be given by way of executory devise, there is no disposition of the property until that estate arises and becomes vested ; and, \* 665 consequently, in the mean time the freehold property \* descends to the heir at law. Now, this is the consequence of the great principle or rule of law, that the freehold cannot remain in abeyance ; but that rule has no application to bequests of personal estate. Consequently, if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation, be accumulated and added to the principal. Subject to the prohibition against accumulation, the ownership both of the principal and interest of the personal estate so bequeathed, may remain in suspense until the executory bequest takes effect, provided it be so given as that it must vest within the time allowed by the rule against perpetuities. In the case of personal estate, the policy of the law does not require that there should always be a representative of the beneficial ownership.

My Lords, these are cardinal principles in the law of property. The distinction arises wholly and entirely from the operation of the rule of law, that the freehold of real estate cannot be permitted to remain in abeyance. In the present case, therefore, we have a will clearly coming within the principle of the rule. But it is sought to be taken out of the rule, because the residue is given in this manner, that the residue of the personal estate is directed to be applied, first, as to two thirds, in the investment and purchase of real estate ; and then the real estate so to be bought is given to the uses to which the particular real estates first devised by the will to the testator's widow, with remainder to his daughter, the Countess of Bective, with remainder to her second son, are devised.

The distinction that is sought to be raised is founded \* 666 \* upon this kind of artificial reasoning, that as the residue must be divided, you ascertain the residue before you proceed to the division. Then it is argued that the two thirds of the residue directed to be invested, must, by reason of the direction for a division, be subjected to a different rule from that to which the entirety of the residue, if it had not been thus divided, would clearly have been subjected. My Lords, there is no substance in any such distinction. The rules which are applicable to the gift

of the entirety of the residue will be applicable to the gift of an undivided part of the residue. There cannot be a possibility of any distinction being introduced which should prohibit the rule that clearly applies to the whole being applied to a portion, or part of the residue.

But then we have been told that this matter in truth is governed by authority, and that the conclusion at which the learned Vice-Chancellor arrived is not a conclusion consistent with that authority. And the authority that has been quoted for the purpose of the argument is the case of *Hopkins v. Hopkins*, decided at the Rolls, I think about the year 1738, and afterwards decided in the Court of Appeal in 1739. That was the case of a gift and devise of real estate — an executory limitation, and a direction for the residue of the personal estate to be invested in land, to be settled to the same uses. It was held, and very rightly held, that during the period of time in which the estate is in suspense between the death of the testator and the arising of the executory use, the rents and profits of necessity descended to the heir. And that proceeded upon the rule of law which I have mentioned. But with regard to the personal estate, the decree was governed by an error which then prevailed, and that error was of this nature, holding that personal property directed to be converted into realty was converted for \* all purposes whatsoever, not only \* 667 the purposes of the will, but the purposes of ownership in every form, and by every title. And accordingly it was held that that conversion would operate for the benefit of the heir, although the heir claims in default of disposition in consequence of there being no direction given by the will, and cannot by any possibility be made to claim under the will.

My Lords, that prevalent error was not corrected until the decision of the case of *Ackroyd v. Smithson*,<sup>1</sup> which decided a point, that of necessity involved this as its consequence, that conversion must be considered in all cases to be directed for the purposes of the will, and is limited by the purposes and exigencies of the will. If therefore the real estate be directed to be sold, with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, that is the title of the heir ; although it is true that when

<sup>1</sup> 1 Brown, Ch. 503.

you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property ; but the property, even in the shape of lands, retains its pristine and original quality of personal estate, for the purpose of determining the ownership. These are simple cardinal principles with which we are all familiar. That last principle to which

\* 668 I have adverted had not been followed \* at the time of the decision of the case of *Hopkins v. Hopkins*, in 1739, nor was it distinctly recognised until, I think, the year 1780, when the case of *Ackroyd v. Smithson* was decided. The case of *Hopkins v. Hopkins* therefore belongs to a period of time when a notion prevailed, the fallacy of which has since been ascertained. And, therefore, the case of *Hopkins v. Hopkins* could not be cited with any effect in order to influence the determination of the case now at the bar.

My Lords, I am not aware that there was any other ground relied upon in the argument which has been addressed to your Lordships, except that to which I have already adverted, namely, that the residue from and after the time when it is to be invested, and when it is to be divided, ceases to retain the character of residue, so as that the bequest of the principal will carry with it the accessory, namely, the accruing income. For that position there is neither reason nor authority ; and I think, therefore, that your Lordships will agree with me, that it is one on which we ought not to rest any such distinction, nor to depart from the simple rules which are clearly applicable to a gift of the residue, and which cannot be inapplicable to such a gift merely because that residue is given in shares, instead of being given in an entire form. I think, for the reasons I have stated, that the case of *Hopkins v. Hopkins* forms no authority, and, therefore, I think that the decision of the Vice-Chancellor unquestionably is quite right, although in particular details it may be wrong. Because (as has been already observed), the operation of the decree directing the investment of the corpus of the personal estate, and of the accruing income thereof, until a child shall come into *esse*, who shall become entitled under the limitations of the estate so directed to be

purchased, is a provision that may, by \* possibility, enure \* 669 beyond the period of time allowed by the Thellusson Act for accumulations. With that formal addition, therefore, made to the decree, I trust that your Lordships will be of opinion that the Vice-Chancellor was quite right, and that the decree ought to be affirmed. But probably your Lordships will think that as there has been a necessary correction in the decree, and having regard also to the nature of the subject, the costs of the appeal may with propriety be allowed to both parties out of the estate.

LORD CRANWORTH. — My Lords, the appellant in this case claims certain interim rents and interests as being entitled to them as the next of kin of the testator. If she is so entitled, it can only be because this was part of the testator's personal estate. But if it was part of the testator's personal estate, it is in express words given by the will. None of the authorities referred to appears to me to touch this case, because if it is to be taken that if there had been a direction to invest the whole, that would have necessarily carried the whole interim profits. I can see no sort of distinction arising from the fact that this residue is to be divided into certain proportions, namely, two thirds and one third.

There is one observation that occurs to me as desirable to make, though it is scarcely necessary to add any thing to what has fallen from the Lord Chancellor. I think that the reason why the same rule was not applied to real estate, depends mainly on the ground referred to by the Lord Chancellor; but there is another circumstance which is always to be considered, namely, that up to a very recent period there was no such thing as a residuary devise of real estate. A man might say, after giving his \* estate \* 670 Whiteacre, and his estate Blackacre, "I give all the residue of my real estate"; but that was in truth only a specific devise of any other estates he had at the time of making the will; because we know that up to a recent date the real estate could not be given unless it was real estate of which the testator was seised at the time. That may have operated to create the distinction; but whether that did or did not form any part of the ground of the distinction, the distinction itself is well established. Here the rule that the personal estate carries with it all accretions must prevail, and, therefore, the consequence is, that the decree of the

Vice-Chancellor appears to me to be perfectly correct, except as to the point which has been mentioned.

LORD CHELMSFORD entirely concurred.

*Mr. Giffard.* — My Lords, this is only a partial appeal from the decree. There are parties who are perhaps not quite so well satisfied as to the other part of the decree. Therefore, perhaps, it would be better that the decree should be affirmed so far only as it has been appealed against. That will leave it open to the other parties.

LORD CRANWORTH. — All the parties have been served.

*Mr. Rolt.* — The trustees represent the interests of unborn children.

THE LORD CHANCELLOR. — I think what is proposed would be a vicious precedent, because the object of an appeal being served on all parties, is to bring in for one hearing and one consideration all the objections to the decree ; and it not being suggested that there are parties who have come into *esse* since the decree, I hope that your Lordships will not adopt the form which is suggested.

\* 671     \* LORD CRANWORTH and LORD CHELMSFORD concurred.

It was afterwards ordered and adjudged, that the decree of the 27th May, 1863, be affirmed, with the following variations, viz. after the words “ arising from such two third parts,” insert the following words, “ until the expiration of a period of twenty-one years from the death of the testator, or ” ; and also after the words “ conveyed to the uses therein mentioned,” insert the following words, “ which shall first happen ” ; and also after the words “ residuary personal estate,” and before the words “ and it is ordered,” insert the following declaration, viz. “ and it is declared, that if, under the directions aforesaid, the accumulation shall be continued for twenty-one years from the testator’s decease, then at the expiration of that term the appellant, Amelia Countess of Bective, as the next of kin of the testator, her executors or administrators, and as residuary legatee of the testator’s widow, will become entitled to the interim income of the aforesaid two third parts of the residuary personal estate, and of the accumulations

thereof, until some person shall become entitled in possession under the limitations of the will as aforesaid." That the costs of all parties to the appeal (such costs to be taxed as between solicitor and client) be paid out of the said testator's general personal estate; and that the cause be remitted with these variations, &c.

Lords' Journals, 4th March, 1864.

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\* ROSE v. WATSON.

\* 672

1864. March 7.

SIR GEORGE ROSE and others, *Appellants*.

JOHN W. WATSON, Clerk, *Respondent*.

*Estate, Sale of. Payment of Principal and Interest. Purchaser.  
Lien. Mortgage.*

Under a contract for the purchase of an estate where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and in equity transfers to him a corresponding portion of the estate.

A mortgage made subsequent to a contract for the sale of an estate conveys to the mortgagees only that which the vendor is entitled to under that contract. If the mortgagee gives no notice of an intention to interfere with the contract, its stipulations remain as before, and affect the mortgagee as they would have affected the mortgagor.

The owner of an estate, part of which was then subject to a contract for sale, executed a mortgage upon it. The mortgagee gave to the vendee notice of the fact of the mortgage, but in all other respects left matters as they were before the mortgage. The vendee was bound by his contract to pay certain sums at stated intervals, together with interest on all that remained unpaid. He made several of these payments, but at length declined to complete the purchase, on the grounds that the representations on which he had been induced to enter into the contract for purchase were unfulfilled:—

*Held* (these representations having been previously adjudged to be sufficient to absolve him from liability to specific performance), that he was entitled, so far as the payments extended, to claim a lien on the estate for their amount, and to enforce that claim against the assignees of the vendor.

In May, 1845, William Potter, who was seised of an estate in fee simple in certain land in the townships of Claughton-cum-Grange and Birkenhead, in the county of Chester, entered into an agreement with Richard and Henry Watson (now represented by



the respondent) to sell them a portion of the land for the sum of 8295*l.*, which sum was to be paid in the following manner : 829*l.*

on the execution of the agreement, and the remainder,  
 \* 673 \* 7466*l.*, on the 1st May, 1848, with interest thereon in the mean time at the rate of five per cent. on the 1st May and 1st November of each year. He sold other portions of the same estate to other persons, and among the rest to one Arthur Acheson Dobbs. The Watsons afterwards purchased Dobbs's interest. On the 15th August, 1845, Potter mortgaged the whole of the estate to the Legal and General Life Assurance Society for 40,000*l.* On the 19th March, 1846, notice of this mortgage was given to the Watsons. In the month of April, 1848, Potter was declared a bankrupt, and assignees of his estate were appointed. On the 15th April, 1848, the Watsons gave notice to the society of their contract of purchase from Dobbs, and that they had paid Dobbs all that he was entitled to receive to his own use, leaving only so much as was payable to Potter, and that the said several contracts had been entered into with Potter, upon a representation by the agent of Potter that a plan produced by him, and which contemplated the laying out of the whole of the estate, and the building of a church in the centre immediately contiguous to the lots so purchased, should be carried into execution ; that this had not been done, that thereby the value of the land had been materially affected, and that the Watsons were entitled to treat the agreement as void, on account of such unfulfilled representations, and they claimed to have a conveyance of the land they had purchased from Dobbs, in satisfaction *pro tanto* of the purchase money they had paid him.

On the 2d September, 1848, the society gave notice to the Watsons, declining to admit this claim. On the 1st November, 1848, the Watsons gave notice to the society that they rescinded their two contracts with Potter and with Dobbs.

\* 674 \* On the 1st May, 1849, the assignees under the bankruptcy filed a bill against the Watsons for specific performance of these contracts, and the Watsons having put in their answer, the cause, under the name of *Myers v. Watson*, came on for hearing before Vice-Chancellor Lord Cranworth, who, on the ground of the representations, which he deemed material in the matter of the contract, dismissed the bill.<sup>1</sup> In August,

<sup>1</sup> 1 Sim. N. S. 523.

1851, the Watsons applied for a return of their deposits, which application was not complied with. The trustees of the society then instituted a suit for foreclosure of the equity of redemption under their mortgage. A decree of foreclosure was made in December, 1851. The two Watsons died, and the respondent became their representative. In December, 1861, the respondent filed his bill against the appellants, who represent the interests of Potter and of the society, setting forth the contracts of purchase, which he alleged to have been entered into in consequence of representations made to the Watsons as to the laying out of the streets, and the building of the church, &c. ; that they had regularly paid the interest on the unpaid purchase money, according to the terms of the contracts ; that the mortgagees were aware of these facts before the mortgage, and took it with full notice thereof ; that no steps had been taken to carry the said representations into effect, but that the land was precisely in the same state as it was when the decree was pronounced in *Myers v. Watson*, and the respondent claimed repayment of the sum of 829*l.*, and of the further sum of 746*l.* 12*s.* which had been paid as interest on the unpaid residue of the purchase money, amounting in the whole to 1575*l.* 12*s.*, in respect of which (and of the interest \* due thereon to \* 675 him) he claimed a lien on the estate. Answers having been put in, the cause came on for hearing on the 30th July, 1862, before Vice-Chancellor Kindersley, who pronounced a decree in accordance with the prayer of the bill. This was an appeal against that decree.

*The Attorney-General (Sir R. Palmer) and Mr. Baily (Mr. Little was with them), for the appellants.*—Under the circumstances which exist in this case, there can be no lien claimed by the respondent. The Watsons had repudiated the contract, and resisted a bill for specific performance of it, *Myers v. Watson*.<sup>1</sup> The respondent who now represents them, cannot at once refuse to perform a contract, and yet claim a lien under it ; *Dinn v. Grant*,<sup>2</sup> where it was held that though the purchaser there would have been entitled to a lien for moneys advanced, if the contract had failed through the vendor's default, yet that as the purchaser himself had abandoned it, he was not entitled to any lien. That case ought to govern the present. The purchaser here may have all

<sup>1</sup> 1 Sim. N. S. 523.

<sup>2</sup> 5 De G. & S. 451.

that the contract gives him, but he is not entitled to ask for more.

Though the claim of lien had been mentioned in some previous cases, the first in which the general subject was discussed was that of *Wythes v. Lee*,<sup>1</sup> a case decided, like the present, by Vice-Chancellor Kindersley. There the vendor was a mortgagee for himself, and in trust for other persons. The proposed sale was under a power contained in the mortgage deed. Money had been paid under the contract of sale; the contract was not completed,

\* 676 \* and the vendee sought to obtain repayment of his deposit.

All that was then decided was, that the bill was not demurrable. That is not an authority for the present decision, which is pronounced in the cause itself. The origin of the notion of a lien in such a case seems to have arisen from a dictum of Sir T. Clarke in *Burgess v. Wheate*,<sup>2</sup> but that dictum really applies only to a case where there is a contract which had made the land the property of the purchaser, and the money that of the vendor, and where, therefore, specific performance would be decreed. Lord St. Leonards, at one time, appeared to dissent from this doctrine,<sup>3</sup> but since the decision in *Wythes v. Lee*, seems to have assented to it.<sup>4</sup> But even this later passage of his Lordship's work does not go the length necessary for supporting the present decision, for here the lien is claimed not in respect of any thing arising upon the contract, but in respect of something collateral to it. The principle of lien, if it applies at all, applies only where the land is held on such an infirm title by the vendor that the purchaser is not bound to accept it, but not to a case like the present, where the purchaser refuses to complete, not on account of the infirmity of the title, but of collateral matter, so that a Court of equity cannot interfere to enforce performance of the contract, but leaves the vendor to his remedy at law. This subject was fully considered by Lord Eldon in *Townshend v. Stangroom*,<sup>5</sup> where he held that, under circumstances similar to those which exist in the present case, the whole agreement must be taken together and completely executed, or entirely abandoned. The representations here alleged to be made \* were not representations

\* 677 of a fact, but of an intention, of something which the party

<sup>1</sup> 3 Drewry, 396.

<sup>2</sup> 1 W. Bl. 123, 150; 1 Eden, 177, 211.

<sup>3</sup> Sugd. V. & P. 224.

<sup>4</sup> Sugd. V. & P. 13 ed. 245, n.

<sup>5</sup> 6 Ves. 328.

did or did not intend to do; the distinction between these things is clearly established in the case of *Jorden v. Money*.<sup>1</sup> Representations even by plans do not form part of a contract, *Squire v. Campbell*.<sup>2</sup> The appellants here can only be treated as aware of these representations by being supposed to have constructive notice of them. In cases like the present, the doctrine of constructive notice was declared by Lord Cranworth in *Ware v. Lord Egmont*,<sup>3</sup> and by Lord Chelmsford in *Montefiore v. Browne*,<sup>4</sup> most inexpedient to be extended.

In this case, when the directors of the insurance company lent the money on mortgage, they gave notice of it to the Watsons. In *Hopkinson v. Rolt*,<sup>5</sup> this House determined that notice to a first mortgagee of the execution of a second mortgage prevented the first from obtaining a priority in respect of advances to which he would have been entitled but for that notice. The principle of that case must be applied here. All the payments made by the Watsons after the notice must be taken as affected by it. They cannot form a ground of lien. It is too late now to make such a claim.

Then as to interest. The Vice-Chancellor gave interest on the whole of the sums paid, whether as interest or principal. There is a distinction as to lien between the case of a vendor and a vendee. The lien of the vendor depends on the contract; the lien of the vendee can only arise when the contract has been destroyed. These sums of interest are not part of the purchase, and when paid, do not represent \* the corpus of the \* 678 estate. If they had not been paid, the vendor would have had no lien in respect of them, nor can a purchaser have, in that respect, a better title by lien than would belong to the vendor.

*Sir H. M. Cairns* and *Mr. C. Hall*, for the respondent, were not called on.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, we have listened with great attention to the elaborate arguments of the learned counsel on behalf of the appellant, but I think that your Lordships will agree with me that the case is determinable

<sup>1</sup> 5 H. L. Cas. 185, 214, 215.

<sup>2</sup> 4 De G., M. & G. 473.

<sup>3</sup> 1 Mylne & C. 459.

<sup>4</sup> 7 H. L. Cas. 262.

<sup>5</sup> 9 H. L. Cas. 514. And see *Bolding v. Lane*, 1 De G., J. & S. 122.

by principles which are very simple and very clear, and which have long been established in the Courts.

When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.

My Lords, that being so, we have only to inquire under the terms of the present contract whether the sums of money paid by the respondent were, or were not, paid in pursuance of that contract. About that, my Lords, there is no controversy whatever. They were *bond fide* payments made by the respondent, in conformity with the contract which required such payments to \* 679 be made in part of the purchase money; and \* they were accepted by the vendor as portions of that purchase money.

In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase money.

Then, my Lords, if that contract fails, and the failure is not to be attributed to any misconduct or default on the part of the purchaser, the obvious question arises, Is the purchaser to be deprived of the interest in the estate which he has acquired by that *bond fide* payment? And yet, my Lords, that he ought to be so deprived is the whole controversy of the appellants at your bar.

It cannot be contested in this case that although the contract has failed of being performed completely, that failure of performance is attributable entirely to the vendor. It is attributable to his misconduct in having accompanied the contract by representations which were the inducement to the purchaser to enter into it, and which representations he is unable to fulfil. It is *res judicata* in the Court of Chancery, by the decision of one of your Lordships, when Vice-Chancellor, that to that failure on the part of the vendor is the non-performance of this contract to be attributed.

But, my Lords, it has been contended at the bar in words, that

the contract has been rejected by the purchaser, and that therefore the purchaser ought not to have the benefit of lien, that is, of that partial ownership, that interest in the estate which is due to the purchase money which he has paid. It is quite a mistake and a misapplication of the word to say that the purchaser has rejected the contract, or put an end to the contract. The purchaser would have been willing to perform the contract if the \* vendor had performed those things which, in good faith, \* 680 he was bound to do. And it is impossible to say, with any truth or accuracy of expression, that the purchaser has repudiated the contract, because the vendor has failed to redeem his own promises to which he had pledged his faith, and in dependence upon which the purchaser entered into the contract. It only gives, in point of fact, an additional ground of complaint to the purchaser, that he cannot obtain the estate that he contracted for, and that, being unable to obtain it by reason of the failure of the vendor, the loss to him is attempted to be aggravated by its being sought to deprive him of the only means of acquiring the repayment of his money (the vendor having become bankrupt), namely, by following the interest which in respect of that payment of money he had acquired in the estate.

In all reason and justice, therefore, and in all principle, it is impossible to find any thing to countenance this attempt on the part of the assignees of the vendor (for the present appellants stand in the shoes of the vendor) to deprive the purchaser of the lien which he has upon the estate.

Having thus adverted in a few words to the principal topics which have been urged at the bar, I may refer also, in a few words, to the subsidiary parts of the case which have been relied on by the appellants. And first, it has been pressed on your attention that the purchaser's claim, being partly in respect of different sums of money paid under the contract after the date of the notice of the mortgage given to the purchaser by the appellants, ought to be disallowed to the purchaser, and that he ought not in respect thereof to be allowed any lien upon the estate. I think that the appellants are entirely \* precluded \* 681 by their own contract from advancing any such argument. The mortgage to the appellants being made subsequently to the contract of sale, and, of course, subject to that contract, conveyed to the appellants only that which the vendor was entitled

to under that contract. And they were content at the time to let their case remain upon that footing ; for, by the notice which they gave to the purchaser, they did not at all attempt to interfere with the contract. They left the purchaser still bound and liable to perform that contract ; and in conformity with its terms the purchaser was bound to pay those sums of money, as interest, to the vendor, who was the assignor of the present appellants. The appellants might, if they had chosen so to do, have given notice to the purchaser to pay those sums of money to themselves ; but having merely a mortgage, and not choosing to interfere with the possession by the vendor of the mortgaged property, the appellants left the mortgagor in the ownership of that property ; they left him in the possession of his rights under the contract, and they left the present respondent bound of necessity to continue to make the payments under the contract, because there was no notice on the part of the appellants that they desired to interfere with that contract, or to give to the money payable under that contract a different destination from that which the contract assigned to it. I think, therefore, my Lords, that there can be no doubt that the present respondent was not only justified, but in fact was bound to continue to make the payments under the contract which the contract prescribed ; and those payments were made until the respondent found that the vendor was not in a condition to perform, but was altogether unable to make good that which, in truth, is regarded in a Court of equity as substantially part of

\* 682 \* the contract, namely, the representations which accompanied the contract when it was made.

Now, that being the state of the case, the other point upon which your Lordships have heard some argument was, that no interest ought to be given in respect of those payments that were so made. But, my Lords, interest is given in respect of principal money when that principal money becomes a lien upon the estate ; and, therefore, it is the same question repeated again in a different form. If the payment of the interest be a payment of money in performance of the contract, in obedience to the terms of the contract, and which the respondent was not only left at liberty to pay in the manner in which he did pay it, but which in truth he was compelled to pay under the contract, with which the present appellants did not choose to interfere, then that money so paid in conformity with the terms of the contract was part of the purchase

money under the contract. It was money advanced upon the faith that the land, the subject of the contract, would become the property of the respondent; and being so paid as part of the purchase money under the contract, and being paid in advance, on the faith of the vendor's performance of the contract, I think that your Lordships will have little difficulty in coming to the conclusion that those sums of money thus paid formed principal sums, in respect of which there became a lien from the time of the payment of them; in consequence of the subsequent failure of the vendor to perform the contract, and becoming such lien, they bore fruit consequently,—that is to say, they entitled the person who is possessed of that lien to claim interest in respect of them.

My Lords, there is no other point, I think, in this case; because the question of time, which is attempted \*to be \* 683 raised in the case of the appellants, has, I think, been almost given up, and properly given up, at the bar. The condition of the appellants has not been altered at all during that period of time. The appellants knew perfectly well at the commencement of that period of time all that they know now. The appellants have not thought fit, during that period of time, to offer in any manner to redeem the respondent's lien. The appellants have been content to let that which turns out to be a lien remain, with all its fruits, up to the present time; and there is no ground, therefore, I apprehend, my Lords, for holding that the respondent is deprived of his remedy in respect of that period of time which has elapsed. The Vice-Chancellor has, no doubt, applied, and very properly applied, the rule contained in the recent statute, that in respect of the interest on those charges, no more than six months' interest shall be allowed. With that the respondent here appears to be content, and I cannot but think that the whole of the principles laid down in the judgment of the learned Vice-Chancellor are sound, and applicable to the case; and that this appeal, which certainly does not stand upon any other ground than one of purely technical reasoning, and which has no merit in point of justice, or in point of equity, ought to be dismissed with costs.

LORD CRANWORTH. — My Lords, I concur in what has fallen from my noble and learned friend in every particular. There can be no



doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent.

It seems to me that that is founded upon such solid and substantial justice, that if it is true that there is no decision affirming that principle, I rejoice that now, in your Lordships' House, we are able to lay down a rule that may conclusively guide such questions for the future. I think, however, that there are some authorities which have been pointed out which have established that rule, in principle, if not in terms. But I think it is unimportant to go into that, because it is now established, and will from henceforth be established as a very sound principle, founded on solid justice.

My Lords, the only part of the case which, I confess, did, for a short time, create a doubt in my mind, was with reference to the payments made after the mortgage. But I think that my noble and learned friend has put the question quite upon the proper footing. When a man mortgages his estate, although there may be notice that there is such a mortgage, all persons who are indebted to the mortgagor in any way, in respect to that estate, must go on and deal with all contracts which have been entered into with the mortgagor, just as if no such mortgage had taken place; unless, indeed, the mortgagee having a right to interfere, does interfere, saying, "Pay no longer." It is upon this principle that tenants are not only at liberty to pay, but are bound to pay their rents to the mortgagor until the mortgagee interferes to stop them. Precisely the same principle must apply to any other contract which exists between the mortgagor and third persons. Until the mortgagee interferes, in consequence of his mortgage, to prevent contracts being carried on between the mortgagor and other persons, those persons must deal with the mortgagor just as if no mortgage had taken place.

With regard to the subject of the lapse of time, and the interest, I will only say that I entirely concur with my noble and learned friend, and therefore I shall not trouble your Lordships by adding a word upon that subject.

*Decree affirmed; and appeal dismissed with costs.*

Lords' Journals, 7th March, 1864.

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LAUTOUR v. HER MAJESTY'S PROCTOR.

1864. March 8.

PETER A. LAUTOUR, *Appellant*.

HER MAJESTY'S PROCTOR, *Respondent*.

*Divorce Court. Adultery after Decree Nisi. 20 & 21 Vict. c. 85. Queen's Proctor intervening. Information to the Court. Costs. 23 & 24 Vict. c. 144.*

The 29th section of the 20 & 21 Vict. c. 85, imposes on the Court, of the Judge Ordinary the obligation to inquire into any countercharge made against any person petitioning for a divorce.

Adultery, alleged to have been committed by the petitioner at any time during the marriage, in which term is included the period between a decree for a divorce *a mensa et thoro* and the actual dissolution of the marriage, is a countercharge into which the Court is so bound to inquire.

If such adultery has been committed between the time when a decree for a divorce *a mensa et thoro*, under the old law, was pronounced, and the time when a petition under the 20 & 21 Vict. c. 85, was presented, praying for a dissolution of the marriage, the Judge Ordinary, on being duly informed thereof, is "not bound" under the 31st section of the statute to dissolve the marriage.

*Quære*, whether he may in his discretion, dissolve it?

The 23 & 24 Vict. c. 144, § 7, enables any one of the public to give to the Court of the Judge Ordinary, between the decree *Nisi* and the decree absolute for a divorce, information to relieve it from being misled on the subject of a divorce petition. That section confers on \*the Queen's Proctor the \*686 power to intervene in a case of collusion, but in that alone, and, except in such a case, if he takes any proceedings in a suit for divorce, he appears only as one of the public giving information to the Court, and under such circumstances the Court has no power to award him costs.<sup>1</sup>

<sup>1</sup> *Gipps v. Gipps*, 11 H. L. Cas. 11.

IN September, 1826, the appellant, then a Colonel, now a General in the army, was married in England to Une Cameron Barclay Jones. They lived together for some years in England, and in June, 1832, a daughter was born. They went together to Boulogne in that year, and the appellant was there imprisoned for debt. In the same prison was a person named George Miles Weston. Mrs. Lantour constantly visited her husband in prison, became acquainted with Weston, who obtained his discharge earlier than her husband, and on the 5th November, 1832, she eloped with him. The appellant was not released till some time in 1833. In January, 1834, having succeeded in serving Weston with process, the plaintiff brought an action of *crim. con.* against him. This action was tried on the 24th June, 1834, before Lord Chief Justice Tindal, and a verdict was given for the plaintiff with 1500*l.* damages. In August, 1836, proceedings were instituted in the Ecclesiastical Court, and on the 28th June, 1838, a decree of divorce *a mensa et thoro* was pronounced. The appellant had never since been in circumstances which enabled him to proceed in Parliament for a divorce. In April, 1859, the appellant presented to the Divorce Court a petition under the 20 & 21 Vict. c. 85, praying for a divorce. Mrs. Lantour and Weston were served with this petition, but neither of them filed an answer. In April, 1861, the case was tried on affidavits, and a decree *Nisi* for the dissolution of the marriage was pronounced.

On the 6th June, 1861, her Majesty's Proctor filed a  
\* 687 \* plea in intervention, to show cause against making the decree absolute, and alleged, 1. "That the petitioner has been acting in collusion with the respondent for the purpose of obtaining a divorce contrary to the justice of the case. 2. That divers material facts respecting the conduct of the petitioner and the respondent have not been brought before the Court. 3. That at the time when the petitioner presented his petition for the dissolution of his marriage, he was, and had been for about twenty-five years prior thereto, cohabiting with a female other than the respondent, and habitually committing adultery with her at divers places (naming them), and that they were still cohabiting as man and wife." The plea concluded in the usual manner with a prayer to the Court to refuse the rule absolute, to dismiss the petition, and to condemn the petitioner in the costs arising from the intervention. Particulars of the plea were afterwards ordered, and were

in form given, and in October, 1861, her Majesty's Proctor filed affidavits in support of the charge of adultery, but did not file any affidavit in support of the charge of collusion. No affidavits were filed in answer. Counsel were heard on both sides, and on the 19th November, 1861, Sir Cresswell Cresswell, the Judge Ordinary, pronounced a decree rescinding the decree Nisi, dismissing the petition, and directing the appellant to pay costs to the Queen's Proctor. This was an appeal against that decree.<sup>1</sup>

<sup>1</sup> The following sections of statutes were referred to in the argument and judgment:—

20 & 21 Vict. c. 85, § 22. In all suits and proceedings other than proceedings to dissolve any marriage, the Court shall proceed and give relief on principles and rules which, in the opinion of the Court, shall be, as nearly as may be, conformable to those on which the Ecclesiastical Courts have heretofore given relief, but subject to the provisions of this Act.

Section 29. Upon any such petition for the dissolution of marriage it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to, or conniving at, the adultery, or has condoned the same; and shall also inquire into any countercharge which may be made against the petitioner.

Section 30. In case the Court, on the evidence in relation to such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has, during the marriage, been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition.

Section 31. In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved: Provided always, that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery; or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted, or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

23 & 24 Vict. c. 144, § 7. Every decree for a divorce shall, in the first instance, be a decree Nisi, not to be made absolute till after the expiration of such time, nor less than three months from the pronouncing thereof, as the Court shall

\*688 \* *Sir H. Cairns* and *Mr. Searle*, for the appellant. — In a case like this, where the adultery is clearly proved, the  
 \*689 Court cannot refuse the decree for a divorce, unless \* it should be satisfied that the husband had been accessory to the adultery, or had condoned it, or that the proceeding was collusive. There is no pretence for saying that any one of these things is true in this case. The charge of collusion was made by the Queen's Proctor, but was not attempted to be proved. The other matters were not even charged.

The adultery of the wife was perfectly established. That gave the appellant a right to ask for a divorce, and he obtained a decree *Nisi* for a dissolution of the marriage. His right to have that decree made absolute, cannot be affected by matter which occurred subsequently to the period when the divorce *a mensa et thoro* was pronounced. His title to a divorce was complete at that time, and if he had then possessed the pecuniary means to go to Parliament for a bill, he would have obtained it. The case of *Major Campbell*<sup>1</sup> shows that misconduct of the husband after the adultery by the wife, was not received in evidence by this House, as constituting a bar to the husband's claim for a divorce. [THE LORD CHANCELLOR. — The reason why this House refused to receive the evidence is not there stated.<sup>2</sup>] The 30th section of

by general or special order from time to time direct: and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not being brought before the Court. And at any time during the progress of the cause, or before the decree is made absolute, any person may give information to her Majesty's Proctor of any matter material to the due decision of the case, who may therefore take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel, and subpoena witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties, or such of them as it shall see fit.

<sup>1</sup> Macq. Pract. H. L. 590.

<sup>2</sup> The reason may perhaps be understood by a reference to the Journals. The evidence of the subsequent adultery was first offered at the earliest stage of the Parliamentary proceedings, when it could only have been offered in the nature

\* the statute states the things which, if proved, shall be \* 690 fatal to the petition. On the other hand, the first part of the 31st section states the matters which, if proved, shall be sufficient to establish the petitioner's claim to a divorce. If the case has been proved, if the petitioner has not been accessory to or coniving at the adultery, or has not condoned it, or has not been guilty of collusion, "then the Court shall pronounce a decree declaring such marriage to be dissolved." The proviso which follows mentions the circumstances in which the Court "shall not be bound to pronounce such decree," but if those circumstances do not occur, and they have not occurred here, the Court is bound to pronounce it. [THE LORD CHANCELLOR. — Do you draw from negative words an affirmative conclusion, that is, that the Court might be at liberty to pronounce a divorce, though it found that the petitioner had been guilty of adultery during the continuance of the marriage?] It might be in its discretion to do so. It certainly would be so as to the other matters stated, such for instance as to unreasonable delay in presenting his petition.

\* Not to be bound to do, does not mean shall not do. The \* 691 Judge may act in his discretion, but the exercise of discretion must be regulated by legal principles. If the conditions mentioned in the Act, as furnishing the case in which the Judge shall not be bound, do not occur, he is bound. [LORD CHELMSFORD. — The decree of divorce *a mensa et thoro* did not destroy the relation of husband and wife. Is adultery subsequent to that partial divorce to be or not, a bar to a complete divorce?]. It perhaps could not be absolutely contended that adultery after a divorce *a mensa et thoro* might not be viewed as committed "during the

of a preliminary bar to the prayer for taking the bill into consideration. It was of course rejected in that form. It was tendered again at the close of the petitioner's case, which it could not have been had not its previous rejection been upon the ground that it formed no preliminary bar. When offered on this second occasion, the proper time for hearing it, if it was admissible at all, it was again rejected. The entry on the Journals, by a reference to the nature of the evidence offered, throws some light on the reason for which it must have been rejected.

The following is the entry: "Mr. Adam, on the part of Mrs. Campbell, requested leave to offer recriminatory matter subsequent to the criminal allegations proved; and also a letter previous to the same, addressed to Mrs. Campbell from the petitioner, threatening her that he would take a mistress. The same was rejected."

Lords' Journals, 25th April, 1799.

marriage," in the ordinary acceptation of that term, but it could not affect the right which that divorce had established; for the statute clearly meant by adultery committed during the marriage, adultery committed before the adjudication of any divorce. In *Pearman v. Pearman*,<sup>1</sup> the Judge Ordinary exercised his discretion on the facts found, and pronounced for a divorce, notwithstanding cruelty had been proved, such cruelty having been the result of the misconduct of the wife. The same course, that of exercising a discretion on the facts, was followed in *Goode v. Goode*.<sup>2</sup> It cannot be said that the misconduct of this appellant led to the adultery of the wife, for in fact it followed the divorce pronounced in respect of that adultery. In *Anichini v. Anichini*,<sup>3</sup> though adultery on the part of the husband committed many years before the suit by him for adultery by his wife was proved, the Court examined into all the circumstances, and thinking it to have been condoned, granted the divorce which he demanded. That was a much stronger case than the present, and yet the adultery of the husband was not held to be a bar to a decree in his favour.

\* 692 \* Then as to costs. The decree is wrong in giving the Queen's Proctor his costs. He can only recover costs where he intervenes successfully in a case of collusion. Here he failed on that point. As to any other matter, he is but like one of the public giving information to the Court, and in that condition of things, the statute does not give the Court the power of awarding him costs. This House, in considering a case on appeal, will, even in affirming the judgment of the Court below, reverse so much of it as gives costs against him if those costs have been improperly given, *Inglis v. Mansfield*.<sup>4</sup>

*The Solicitor-General (Sir R. P. Collier, Dr. Spinks* was with him) was directed to confine his observations to the question of costs under the particular provisions of these statutes. — The provisions of the 20 & 21 Vict. c. 85, § 51, are of a general character. They are "that this Court, on the hearing of any suit under this Act, and the House of Lords on the hearing of any appeal, may make such order as to costs as to such Court or House respectively may seem just." There the general power to award costs is given. Then comes the 7th section of the 23 & 24 Vict.

<sup>1</sup> 1 Swab. & T. 601.

<sup>2</sup> 2 Swab. & T. 253.

<sup>3</sup> 2 Curteis, 210.

<sup>4</sup> 3 Clark & F. 362.

c. 144.<sup>1</sup> The effect of that section is to enable the Court to hear any person to show cause against a decree Nisi, by reason of its having been obtained by collusion, or by material facts not having been brought before the Court; and any such person may give information to the Queen's Proctor, "of any matter material to the due decision of the case," and if on such information the Queen's Proctor may suspect collusion, he may intervene in the suit, and costs may be awarded him. The Queen's Proctor is not confined to direct evidence of collusion. \* Collusion may \* 698 be shown by the conduct of the parties, especially where they have a common interest in procuring a divorce, and where one having the means to prevent a decree for a divorce by laying before the Court certain information, withholds that information. In such a case the intervention was intended by Parliament to take place. That was the case here. There was nothing stated to the Court; material information was withheld, and the decree very properly treated this as a case within the very purview of the statute. The two statutes must be read together. In *Gray v. Gray*,<sup>2</sup> the Queen's Proctor alleged, as he did here, adultery and collusion, and was allowed his costs. And so he was in *Drummond v. Drummond*.<sup>3</sup> In *Boulton v. Boulton*,<sup>4</sup> the Queen's Proctor intervened and pleaded collusion, bigamy, and adultery. The husband denied the first, but admitted the other two; and the Court dismissed the petition, and ordered him to pay the costs of the intervention. [LORD CHELMSFORD. — Except the Queen's Proctor alleged collusion, has the Court any power to allow him to intervene at all?] Here he did allege it, and in substance proved the allegation, by showing that material facts had been kept from the knowledge of the Court. Without his information in this case the Court could not have come to a proper decision.

*Sir H. Cairns*, in reply. — Costs can only be given to the Queen's Proctor, where he intervenes on the ground of collusion. In all other cases he is but one of the public giving information to the Court; and as to such cases there is no authority to give costs.

\* THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, \* 694 this is a case arising under very peculiar circumstances; and

<sup>1</sup> See ante, p. 688.

<sup>2</sup> 2 Swab. & T. 263.

<sup>3</sup> 2 Swab & T. 269.

<sup>4</sup> 2 Swab. & T. 405, 551, 638.



although I think your Lordships will not hesitate to arrive at the conclusion which has been arrived at by the Court below, yet the nature of the case deserves that it should not be dismissed from your Lordships' bar without a particular statement of the reasons for your decision.

It appears that General Lautour obtained a decree for a divorce *a mensa et thoro* from the Ecclesiastical Court in 1838. And there is no reason to doubt that that divorce was rightly obtained, on the ground of the adultery of his wife. From that time until now the parties have not been living together. And it also appears that the wife, who at that time was divorced in that form, has ever since been living with the adulterer. General Lautour alleges (what may be easily believed) that he was not in circumstances to comply with the exigency of the then existing law, namely, to apply to Parliament for an Act dissolving his marriage. But treating himself as thus divorced from his wife, he has since lived and cohabited with another woman as his wife. After the passing of the Divorce Act, in 1857, he applied to the Court then established for a dissolution of the marriage. In the petition for that dissolution he did not in any way advert to the now admitted fact, that from a short period subsequent to the date of the divorce *a mensa et thoro* up to the present time, he had been living in the manner I have already described.

The contention on the part of the counsel for General Lautour is, that the Judge Ordinary was at liberty, under the circumstances of the case, to pronounce a decree for the dissolution of the marriage.

\* 695     \* The Act of Parliament, which was passed in the year 1857, is, certainly as to this point, worded in a peculiar manner. In the first place, I may observe to your Lordships, that I think the 22d section has no application to the case before you ; for by that section proceedings to dissolve the marriage are entirely excluded from its operation.

Then we come to the consideration of the 29th, 30th, and 31st sections of the Act, which furnish the rules and principles to be observed by the Court in suits for the dissolution of the marriage. And first, the 29th section puts upon the Court the obligation of inquiring into any countercharge that may be made against the petitioner. Under that enactment, therefore, it would have been the duty of the Court in the present case to inquire into any

countercharge of adultery against General Lautour, which had been brought before it. And there can be no doubt that, in the eye of the law, whatever may be the case in another view of the matter, in a legal point of view, General Lautour has been living in adultery during the time of his cohabitation with the person who now passes as his wife. It was, therefore, under circumstances which admitted of that charge of open adultery that he presented his petition. And, as I have already observed, it was the duty of the Court to entertain that countercharge.

Then the 30th section puts upon the Court the obligation in certain circumstances of dismissing the petition. But those circumstances, enumerated in the section, do not include the case of a countercharge of adultery brought by the respondent against the husband petitioning for a dissolution, because it says, "if the Court shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has, during the marriage, been accessory to, or conniving at, the adultery of the \* other party, or has condoned the adultery complained of, \* 696 or that the petition is presented or prosecuted in collusion with either of the respondents"; then in any one of those cases the petition for dissolution shall be dismissed. Neither does it include a countercharge of adultery which has been condoned, for the section I have read does not in any manner advert to this particular case.

The 30th section having described cases in which the petition shall be dismissed, the 31st section describes cases in which a decree for dissolution shall be pronounced. And it is "in case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved."

The obligation thus imposed to decree a dissolution of the marriage is modified by a proviso; and the present case depends on the true construction to be put upon that proviso. The proviso takes certain cases which are here mentioned out of the category of the obligation created by the first part of the section. And the cases described in the proviso, in which the Court shall not be

bound to pronounce such decree are, “if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable \* 697 able \* excuse, or of such wilful neglect or misconduct as has conduced to the adultery ” — a very wide extent of inquiry.

Now, my Lords, the law as it stood in the Ecclesiastical Court at the time of the passing of this statute may, without impropriety, be referred to as furnishing some sort of clue to the reason for the introduction of that proviso. The counsel at the bar have referred with great propriety to a case decided by Dr. Lushington, of *Anichini v. Anichini*.<sup>1</sup> There the case is put of an adultery committed by the husband many years before the occurrence of the adultery by the wife, which was the subject of the husband's complaint ; and where, to use the words of Lord Stowell, that absolute act of adultery may have been forgiven or passed over by the wife, and cohabitation subsequently continued between the parties. In such a case as that, it appears that the Ecclesiastical Court did not think itself under the obligation to consider that that absolute act of adultery was a ground for refusing a sentence of divorce *a mensa et thoro*. It is possible therefore that the Legislature might have considered, in this proviso, that an act of adultery committed by the husband many years before the complaint on which he afterwards sought a dissolution, and passed over or forgiven by the wife, ought to be a ground of recrimination so as legally to rebut his petition, unless that act of misconduct on the part of the husband had been followed by subsequent acts of misconduct. It therefore chose such a form of words, that if the countercharge consisted of an act of adultery by the husband or by the wife, on a former occasion, the Court should not be under an obligation to pronounce a decree.

\* 698 \* The present appellant contends that although there has been, clearly, in the eye of the law, adultery on his part, yet it was adultery under such circumstances of mitigation (if I may use such a term), that the Court under those words in the statute, had a discretion to pass it over, and, notwithstanding the

<sup>1</sup> 2 Curteis, 210.

existence of such recrimination, to pronounce a decree for the dissolution of the marriage.

I cannot come to the conclusion that the Court had any such power. The Court was not bound, I admit, to pronounce a decree for dissolution of the marriage ; but I conceive there is a difference between declaring that the Court shall not be bound to dissolve the marriage, and declaring that under those circumstances the Court had a discretionary power to dissolve the marriage. It is not very material to press the distinction, because I am quite sure your Lordships will agree with the learned Judge in the Court below, and will think that he rightly held himself, under the circumstances, not bound to pronounce a decree for dissolution of the marriage.

Now, my Lords, that in truth is the only point which arises here. If the learned Judge was wrong in holding that he was not bound to pronounce a decree, then there would be room for the appeal ; but to say that the learned Judge, having before him a fact admitted, which he was bound to hold to be, in the eye of the law, adultery, was still at liberty to pronounce a decree of dissolution, would be to put a construction upon the words of this statute, and upon the power given to the Court, which I think your Lordships would not for a moment be inclined to do. I cannot therefore but think that the learned Judge's decree in the Court below was justly and properly arrived at; and that that decree ought to be affirmed.

But there arises a question on the subject of costs, \*namely, the costs given by the decree to the Queen's \* 699 Proctor.

Now, my Lords, this is a question very properly made the subject of appeal, because the question which arises is, whether the learned Judge in the Court below had power, under the words of the statute, to direct costs to be paid by the petitioner to the Queen's Proctor.

The Queen's Proctor is not regularly a party to the suit. The Queen's Proctor becomes a party to the suit under the circumstances and in the manner defined by the statute of the 23 & 24 Vict. c. 144. Now that statute has two objects ; one to give to the whole of the public the power to give information to the Court in the interval between the decree Nisi and the decree absolute, which should relieve the Court from being misled by the petitioner, and from pronouncing a decree under circumstances where the

petitioner was not entitled to such a decree. Another and a special power is contained in the section, that where the Queen's Proctor has the power to intervene in a case of collusion, he may intervene and become a party to the suit to prove that case of collusion. And then it says that the Queen's Proctor shall be entitled to his costs. The Court shall have power to order the costs of the counsel and witnesses of the Queen's Proctor to be paid by the parties, or such of them as it shall seem fit.

In the present case the Queen's Proctor intervened, and alleged not only a case of collusion, but alleged also the existence of material facts under circumstances contemplated in the first part of the clause, which circumstances had not been brought before the Court, and the Court made an order that he should give the particulars of those material facts. Those particulars were em-

\* 700 bodied \* in affidavits filed by the Queen's Proctor. But

there was no attempt on the part of the Queen's Proctor to make out that case of collusion which was the subject of his first allegation. The Queen's Proctor, therefore, I submit to your Lordships, must be treated here as one of the public, coming in to bring before the Court material facts for the Court's information, which had not been presented to it, either by the petitioner or by the respondent. But, my Lords, I think you will agree with me, that the latter part of the section is not so worded as to take in the case of the Queen's Proctor acting merely for the purpose of bringing material facts before the Court, and that the Court has no power to give the costs of his so doing, under and by virtue of the authority contained in that section.

I must therefore submit to your Lordships that in affirming this decree upon the merits, you will pronounce that that part of it which gave the costs was pronounced as in the exercise of a power with which the Court was not invested under the statute, and that that part of the decree must be reversed.

LORD CRANWORTH. — My Lords, I concur with my Lord Chancellor in both points, namely (to take the latter point first), that there was no jurisdiction in this case to give these costs; and, also, that the learned Judge Ordinary was quite right in not making this decree absolute. I do not know that I quite agree with the Lord Chancellor as to the question of discretion. I wish to reserve my opinion upon that. I think very likely there may be

cases in which there is no more discretion in the Court than I collect from his Lordship's observations he thinks the Court possesses. \* But supposing there to be the utmost latitude \* 701 of discretion in the Court, in my opinion this was not a case in which the Judge would have been justified in doing any thing else than refusing this decree. I believe it was a matter notorious at the time, that the only object of the Act was to enable divorce *a vinculo matrimonii* to be obtained judicially, instead of applying to Parliament for an Act to dissolve the marriage. A case was quoted, I think, in the year 1799.<sup>1</sup> Now I have no hesitation in saying that, whatever may have been the practice then, the practice in modern times would have been that, in the case of an application for a divorce on the ground of adultery by a husband who had been separated from his wife in consequence of her adultery, and had been himself living in open adultery for twenty years, such an application would never have been listened to by Parliament. Therefore, not only by analogy to what would have been done under the ancient system of applying for private Acts of Parliament (*privilegia*, as they were called), but also on principle, I think that an application by a person who is obliged to admit that he has been living in open adultery with another woman for twenty years, constitutes a case in which it would have been extremely wrong if the Judge Ordinary had exercised any other discretion than he has done. I therefore quite agree with the Lord Chancellor that the Judge Ordinary's decree should be affirmed, except as to the costs.

THE LORD CHANCELLOR. — I ought to have mentioned to your Lordships that in looking at the case of Campbell, which was cited at the \* bar, I find it to have been a case of in- \* 702 cestuous adultery with a niece, and therefore that may well account for the Court refusing to receive evidence merely of re-crimination.

LORD CHELMSFORD. — My Lords, I agree with my noble and learned friends, both with regard to the merits of the case, and also upon the question of costs.

As to the decree itself, there can be no doubt that the fact of the adultery of the husband after the divorce *a mensa et thoro*

<sup>1</sup> Campbell's Case. See ante, 689.

was a material fact, of which the Court ought to have been informed.

It was properly admitted by Sir Hugh Cairns that the Queen's Proctor has the same right as any other of her Majesty's subjects to inform the Court of any facts which upon the original hearing may have been withheld from it. Accordingly, the Queen's Proctor intervening, affidavits were presented to the Court by which the adultery of the petitioner was clearly proved, an adultery continuing for a long course of years.

Under these circumstances, the learned Judge of the Divorce Court unquestionably, as it appears to me, under the 31st section of the 20 & 21 Vict. c. 85, had a discretion to refuse a decree for a divorce, because the words are, that "the Court shall not be bound to pronounce such decree, if it shall find that the petitioner has, during the marriage, been guilty of adultery." Now adultery was proved during the marriage; and it appears to me to be a very wholesome exercise by the learned Judge of the discretion which he is invested with by the Act of Parliament, to say that if

a person who has obtained a divorce *a mensa et thoro*, and  
 \* 703 who is contemplating a \* complete divorce, cannot abstain in the interval, but will be guilty of adultery, he ought not to be permitted to obtain that which he is seeking for, and which undoubtedly he might have been entitled to but for that intervening misconduct.

Then, my Lords, with respect to the question of costs; I think that is perfectly clear. I think the Court had no discretion under these circumstances to decree costs to the Queen's Proctor.

The power of the Queen's Proctor to intervene is given under the 7th section of the 23d and 24th of the Queen. That power is confined by the words of the statute to cases where he alleges collusion, and there by leave of the Court he may intervene, and may retain counsel and subpoena witnesses to prove the allegation. In the present case, the Queen's Proctor intervened, alleging collusion, which was the only ground upon which he could intervene in the character of Queen's Proctor. But no case of collusion, though it had been alleged in the petition, was attempted to be proved.

Then with regard to the costs, the Act of Parliament provides "that it shall be lawful for the Court to order the costs of such counsel and witnesses and otherwise arising from such interven-

tion." What intervention? The intervention of the Queen's Proctor. Now the Queen's Proctor can only intervene in a case of collusion; and therefore on the present occasion the Queen's Proctor had no right in that particular character to intervene, because no case of collusion was established against the parties. This, therefore, is a case in which it appears to me that the Court had no jurisdiction to give costs. It was not a case in which there was a party regularly before the Court in that character in which alone the Court was entitled \* to give costs to the \* 704 official person intervening; and therefore I agree with my noble and learned friends that the decree so far ought to be reversed.

*Decree in part reversed; and as to the remainder thereof, affirmed.*

Lords' Journals, 8th March, 1864.

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THE ATTORNEY-GENERAL v. SILLEM.

1864. March 11, 14, 15; April 6.

THE ATTORNEY-GENERAL, *Appellant*.

HERMAN JAMES SILLEM and others, *Respondents*.

*Jurisdiction. Appeal. Revenue Side of Exchequer. Pending Suit. Common Law Procedure Acts, 1852, 1854. 22 & 23 Vict. c. 21.*

The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal, nor both combined, can create such a right, it being essentially one of the limitation and of the extension of jurisdiction.

The words, "superior Courts of Common Law at Westminster," in the Common Law Procedure Acts, do not include the revenue side of the Exchequer.

In the 26th section of the Queen's Remembrancer's Act (22 & 23 Vict. c. 21), the words, "process, practice, and mode of pleading" are not used in the abstract, but with reference to existing Courts, the word "practice" means the rules which guide the mode of proceeding within the walls of the Court itself; and the later words of the section give the Barons the power to "extend, apply, and adapt" to the revenue side of the Court of Exchequer no more than the "process, practice, and mode of pleading," which were already in use on



the plea side of that Court, and these words bear in the second part of the section the same meaning as in the first part of the section.

*Held*, therefore, that rules, which, by applying to cases on the revenue side of the Exchequer, the provisions of the Common Law Procedure Act of 1854 respecting appeals on motions for a new trial, gave an appeal in such motions on the revenue side, were rules made without legislative authority, and were consequently void. (*Diss.* Lord Cranworth and Lord Wensleydale.)

Per LORD CRANWORTH and LORD WENSLEYDALE.—The rules were war-

\* 705 ranted \* by the 26th section of the 22 & 23 Vict. c. 21, for they only applied to proceedings on the revenue side of the Exchequer (as that section authorised), the practice then existing on the plea side where the right of appeal against a decision on a motion for a new trial had been already, by the 17 & 18 Vict. c. 125, established by the Legislature itself.

Per LORD WENSLEYDALE.—The second part of the 26th section of the 22 & 23 Vict., taken by itself, would allow all the provisions of the Common Law Procedure Acts of 1852 and 1854 to be adopted on the revenue side of the Exchequer.

If the rules had been valid in themselves, it would not have been an objection to them that they affected suits then pending.

ON the 25th May, 1863, the Attorney-General filed an information on the revenue side of the Court of Exchequer, against the ship "Alexandra," alleging it to be forfeited to her Majesty by reason of certain breaches of the Statute 59 Geo. 3, c. 69.

The present respondents, who claimed the ship as their property, appeared to the information, and pleaded a general denial that the ship was liable to forfeiture. Issue was joined thereon. The case was tried at the sittings after Trinity Term, 1863, before the Lord Chief Baron and a special jury, and a verdict was found for the defendants. On the 3d November, the Attorney-General moved for a new trial on several grounds, one of which was that of alleged misdirection by the learned Judge. It was then doubted whether a decision on such a motion could be carried to a Court of appeal. In consequence of what occurred in the course of the discussion which then took place, the motion was postponed for a few days.

On the 4th November, 1863, the Lord Chief Baron and three of the Barons of the Court of Exchequer, made an order, "in pursu-

ance of the provisions contained in the 26th section of 22

\* 706 & 23 Vict. c. 21, that the following \* provisions of the

Common Law Procedure Act, 1854, be extended, applied, and adapted to the revenue side of the Court of Exchequer; and also that the following rules as to giving bail in cases of appeal

shall be in force on the revenue side of the Court of Exchequer.”<sup>1</sup> \* On the 5th November the rule for a new \*707

<sup>1</sup> The rules themselves were these : —

“ 1. In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused, or granted and then discharged, or made absolute, the party decided against may appeal.

“ 2. In all cases of motions for a new trial upon the ground that the Judge had not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or, provided the Court in its discretion think fit that an appeal should be allowed ; provided that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed.

“ 3. The Court of Error, the Exchequer Chamber, and the House of Lords, shall be Courts of appeal for this purpose.

“ 4. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to the Queen’s Remembrancer, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge.”

The 5th rule regulated the form of appeal.

“ 6. When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal.

“ 7. The Court of Appeal shall give such judgment as ought to have been given in the Court below ; and all such further proceedings may be taken thereupon as if such judgment had been given by the Court in which the record originated.

“ 8. The Court of Appeal shall have power to adjudge payment of costs, and to order restitution, and shall have the same powers as the Court of Error in respect of awarding process and otherwise.

“ 9. Upon an award of a trial *de novo*, by the Court, or by the Court of Error, upon matter appearing upon the record, error may at once be brought ; and if the judgment in such or any other case be affirmed in error, it shall be lawful for the Court of Error to adjudge costs to the defendant in error.

“ 10. When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the Court shall otherwise order.”

The 11th rule related to the making of affidavits by either party.

“ 12. Notice of appeal shall be a stay of execution, provided that within eight days after the decision complained of, or before execution delivered to the sheriff, bail to pay the sum recovered, and costs, or to pay costs when adjudged, be given in like manner and to the same amount as bail in error is requested to be given, under the rules of this Court, made on the 22d June, 1860, or as near thereto as may be applicable ; provided that such bail shall not be necessary to stay execution in cases where the appellant is the Crown, the Attorney-General

trial was granted. The case was afterwards argued on this rule, and the Judges were equally divided in opinion upon it, when, in order that it might be further considered, Mr. Baron Pigott withdrew his judgment, and the rule was discharged.<sup>1</sup> Against this judgment of the Court of Exchequer, the Attorney-General appealed to the Court of Exchequer Chamber, under the authority of the rules made on the 4th November, 1863, but the parties not agreeing as to a case, it was settled and signed by the Lord Chief Baron, and was then carried by way of appeal to the Exchequer Chamber. The case was there argued, not upon the merits, but on the preliminary point whether the Barons of the Exchequer had authority to make the general rules of the 4th November, 1863, by which the proceedings in cases on the revenue side of the Exchequer (so far as an appeal on a rule for a new trial was concerned) were assimilated to the proceedings on the common-law side. The Judges in the Exchequer Chamber were divided, \* 708 but a majority was of opinion that the \* Barons of the Court of Exchequer had no such authority, and that consequently the appeal ought to be dismissed, and it was dismissed accordingly.<sup>2</sup>

The present appeal was then brought against the decision.

*The Attorney-General (Sir R. Palmer) and the Solicitor-General (Sir R. P. Collier, with whom were the Queen's Advocate, Sir R. Phillimore, Mr. John Locke and Mr. T. Jones), for the appellant.* — The question here is, whether the Barons had authority under the 26th section of the Queen's Remembrancer's Act,<sup>3</sup> to make

on behalf of the Crown or the Prince of Wales, or the Duke of Cornwall, for the time being.

"The foregoing rules shall come into operation and take effect forthwith, and apply to every case, matter, and proceeding now pending."

<sup>1</sup> 2 H. & C. 431.

<sup>2</sup> 2 H. & C. 581.

<sup>3</sup> 22 & 23 Vict. c. 21 (The Queen's Remembrancer's Act), section 9. "Section 222 of the 'Common Law Procedure Act, 1852,' for the amendment of defects and errors in any proceeding in civil causes, and concerning the costs and terms of such amendment, shall extend to all suits and proceedings on the revenue side of the Court of Exchequer."

The 10th section grants the right to state a special case, and declares how the judgment of the Court of Error shall be given thereon.

Section 11. In case of no agreement as to costs they are to follow the event.

Section 12. In case of an appeal against the decision of commissioners under

new rules which should assimilate the \*process, practice, \*709 and pleading in cases on the revenue side to those on the

the Succession Duties Act, the Court of Appeal shall give such judgment as ought to have been given in the Court of Exchequer.

Section 13. Such appeal may be made to the Exchequer Chamber and to the House of Lords.

Section 14. Notice of appeal must be given to the opposite party, and to the proper officer of the Court..

Section 15 regulates summary proceedings.

Section 16. All the powers, authorities, and provisions contained in the 1 Wm. 4, c. 22, and the 13 Geo. 3, recited therein, as to witnesses, &c., "and all the powers, authorities, and provisions in the 46th, 47th, 48th, and 49th sections of the Common Law Procedure Act, of 1854, are hereby extended to all suits on the revenue side of the said Court of Exchequer," and any indictment for perjury may be tried in the county in which the evidence was given, or in Middlesex if the evidence was given out of England.

Section 17. Revenue causes may be tried by the justices of assize, without a commission issued for that purpose.

Section 18 regulates the time within which error may be brought.

Section 19. "A writ of error shall not be necessary or used in any suit or proceeding in error on the revenue side of the Court of Exchequer, and the proceedings in error shall be a step in the cause, and shall be taken in manner, and subject to such forms and conditions as to giving bail or security as may be directed by any rule or order made by the Barons under this or any other Act or Acts of Parliament authorising the same."

Section 20. "Either party may tender a bill of exceptions on the trial of any issues arising on the revenue side of the Court, and the like proceedings may be had and taken thereon as in such cases between subject and subject."

Section 21. "In any suit on the revenue side of the Court, the costs between the Crown and the subject may be adjudged on the same principles as between subject and subject, so far as those principles are applicable, subject to such rules as to costs as may be made by the Barons under this or any other Act of Parliament."

Section 22. No pleadings on the revenue side to be invalidated for defect of form.

Section 26. "It shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court, and as to the allowance of costs, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper; and also from time to time, by any such rule or order, to extend, apply, or adapt any of the provisions of the 'Common Law Procedure Act, 1852,' and the 'Common Law Procedure Act, 1854,' and any of the rules of pleading and practice on the plea side of the said Court to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court."

civil side of the Court of Exchequer. It is submitted that they had such authority. The objection to the existence of that authority is founded on a contention that that Act itself provides

\*710 for every thing \* which the Legislature intended should be done with respect to revenue cases, and leaves nothing but mere matters of detail to the Barons, and that this is not a mere matter of detail, but is the creation of a new right. But the words of the statute show that the Legislature, after providing for all those matters in which, because of extrinsic circumstances, legislative interference was absolutely necessary, did leave all other matters to the discretion of the Barons of the Exchequer. This is not the creation of a new right, but the mere regulation of one already in existence. The words of the 26th section are not confined to "process, practice, and pleading." The second part of the section treats of something more, and by the very way in which it is introduced, shows that the adoption of the provisions of a statute was intended. The words are, "and also from time to time to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts of 1852 and 1854," to the revenue side of the Exchequer. What had been done on the plea side, had been so done by these Procedure Acts, or under their provisions. The new rules only direct, in accordance with the provisions of the second part of the 26th section, that what had there been done shall be extended to the revenue from the plea side of the Court. It is said that the Legislature could not have intended to hand over to the Court of Exchequer the power to grant an appeal in any case in which it had not itself expressly granted such appeal. But by the Procedure Statutes, the Legislature had granted an appeal in the case of a motion for a new trial, and by this 26th section it authorised the extension of those statutes to the revenue side of the Exchequer. To construe the Queen's Remembrancer's Act in a different manner, will be to defeat its general provisions.

Even the words "process, practice, and mode of pleading,"

\*711 \* in the first part of the section, are wide enough to embrace every proceeding in a case, from its beginning to its end, including its passage through a Court of error. They are equivalent to "procedure."

It is true that the statute provides for a great many matters in particular. They are all matters which in their nature required specific legislation ; but having dealt with them, it hands over to

the Court the duty to provide for details as to all those things, and expressly to assimilate the proceedings on the revenue side to those on the plea side of the Exchequer. That is its special object. The giving the right of appeal was, of course, a part of that object. Such had been the general tendency of the Legislature itself for many years past. Originally, no doubt, the course of the proceedings on the two sides of the Court was very different, and the Crown possessed peculiar privileges in cases on the revenue side [the learned counsel gave a sketch of the history of the Exchequer and its procedure], which it did not possess anywhere else. But from time to time these privileges had been given up, and the general provisions in the 26th section of the 22 & 23 Vict. were intended to put an end to them all, and to make the procedure on both sides of the Court the same.

In this way bills of exception are now admissible on the revenue side of the Exchequer. They were not so originally. The Crown was not mentioned in the Statute of Westminster 2 (13 Edw. 1, St. 1, c. 31). The power to examine errors in the Exchequer was, by the 31 Edw. 3, St. 1, c. 12, given only to "the chancellor and treasurer, taking to themselves the justices and other sage persons." But even in that statute the word "process" is used so as to signify the whole procedure, and the Rolls were to be \* sent back to the Exchequer for that Court to make execution "as pertaineth." \*712

The Council or Exchequer Chamber was thus constituted, Coke's Institutes.<sup>1</sup> The 31 Eliz. c. 1, and the 16 Ch. 2, c. 2, were passed to prevent the abatement of the writ of error by the "not coming of the Lord Chancellor and Lord Treasurer," and the 20 Ch. 2, c. 4, permitted judgment to be given on it in the absence of the Lord Treasurer. In all these statutes the words "suit of error" and "writ of error" had been used as meaning the same thing. The identity of the Exchequer with the Exchequer Chamber had been preserved throughout. Coke's Institutes.<sup>2</sup> The present form of process in the Court of Exchequer was fixed by the statutes, the Acts for "uniformity of process in personal actions in her Majesty's Courts of law at Westminster," and then came the Common Law Procedure Act of 1852. That was an "Act to amend the process, practice, and mode of pleading in the superior

<sup>1</sup> 4 Inst. 105, 106.

<sup>2</sup> 4 Inst. 110-119.

Courts of law at Westminster." That statute treated of error,<sup>1</sup> abolished the writ of error, and made "a proceeding to error a step in the cause." [THE LORD CHANCELLOR. — How came it that that statute did not include the revenue side of the Exchequer?] It applied itself only to forms of proceeding in personal suits, but it used the words "process, practice, and mode of pleading," and as to personal suits, there is no doubt that these words included every thing which related to a suit from its commencement to final execution. *Blackmore's Case*,<sup>2</sup> where "process" is said to mean

"all the proceedings in all real and personal actions, and  
\*713 \* in all criminal and common pleas: *et processus derivatur a procedendo ab originali usque ad finem*"; and Britton's authority is cited. The same word is used in the Queen's Remembrancer's Act, 22 & 23 Vict. c. 21, § 26, and must have as extensive a meaning in that as in previous statutes.

What has been the spirit of modern legislation on this subject? Up to the beginning of the present reign, trials in causes arising in the Exchequer could not be had at the assizes, without a commission specially issued for that purpose, the Statute of Westminster 2 (13 Edw. 1, c. 30), having merely authorised so taking "inquisitions of pleas" the Courts of King's Bench and Common Bench. The provisions of the 13 Edw. 1 were, by the 2 & 3 Vict. c. 22, extended to causes and pleas "pending in the Court of Exchequer of Pleas. That was afterwards adopted by the 22 & 23 Vict. c. 21, and by section 17 applied to all suits and proceedings pending on the revenue side of the Exchequer. In this way the distinction formerly existing was abolished, and the Legislature showed an unmistakable intention that the proceedings on both sides of the Court should be assimilated.

The proceedings in error in personal causes were regulated by the 15 & 16 Vict. c. 76, the Act of 1852, which made the proceeding in error a step in the cause, and regulated every thing to be done, and directed the record to remain in the original Court, and to be corrected according to the judgment of the Court of Error. [THE LORD CHANCELLOR. — But did not enlarge or extend the jurisdiction of any Court.] This is not an extension of the jurisdiction of the Court. The Legislature had already given an appeal in revenue cases in the form of a bill of exceptions. These orders did not create any new right, but merely allowed the parties

<sup>1</sup> 15 & 16 Vict. c. 76, §§ 148–167 incl.

<sup>2</sup> 8 Rep. 157 b.

to pursue an existing remedy by the \* means of a more \*714 convenient and less expensive form. The statute created certain new remedies, as, for instance, with respect to ejectments by mortgagees, and gave the Judges powers to make new rules, new writs and new forms (sections 223, 224), and it gave authority (section 228) to her Majesty to extend this Act or the rules to "any Court or Courts of record in England or Wales," which power was still further extended by the 105th section of the 17 & 18 Vict. c. 125, the Common Law Procedure Act of 1854. Several new powers were there again given to the Judges, such as those relating to injunctions, discovery, and equitable pleas. These were not matters of process, practice, and pleading, but were substantive remedies, which of course required the power of the Legislature for their creation. The others did not.

If the 26th section of the Queen's Remembrancer's Act had said that all the provisions of the Common Law Procedure Act of 1854 should be extended, applied, and adapted to the revenue side of the Exchequer, there could be no doubt about the matter. A different construction cannot be put upon the same words because they are found in an order of the Court which is made under the statute. The orders operated for the equal benefit of the subject and the Crown, and were therefore valid, as carrying into effect the repeatedly declared intentions of the Legislature.

*Sir H. Cairns* and *Mr. Mellish* (*Mr. J. B. Karlake* and *Mr. Kemplay* were with them), for the respondents. — These rules are objectionable, as being retrospective. But beyond that they are void, as not warranted by the statute. They are also bad, as affecting to govern the process and practice of the Court of Error itself.

\* The power given to the Barons by the Queen's Remem- \*715 brancer's Act is strictly confined to making orders relating to the "process, practice, and mode of pleading" in the Court of Exchequer itself. Where other matters were to be dealt with, the Legislature itself has dealt with them. Thus the 9th section specially applies the 222d section of the Common Law Procedure Act of 1852; and the 10th and 11th sections in like manner gave the right to state special cases for the opinion of the Court. The force of the inference arising from this fact was confessed by *Mr. Justice Willes*, when he acknowledged that he was bound to account for the special provisions found in an Act, in which it was



contended there existed a power for the Barons to effect a general uniformity by making general rules. The distinction indeed runs throughout the Queen's Remembrancer's Act. The 12th and 15th sections relate to appeals on legacy and succession duties, the right to bring which is specially given. If the Legislature had intended that the subject should have the right to carry a decision on motion for a new trial in a revenue case to a Court of error, it would in like manner have provided for such a case. The fact that it did not so provide is conclusive, to show that such a right was not intended to be given. The 18th and 19th sections refer to error; and speaking of cases in which parties are entitled to bring error, it is declared that the giving bail in error shall be done under conditions imposed by the Barons under this or any other Act of Parliament. This was at once a special grant, and a special limitation of the power of the Barons, and shows that they were not intended to possess, with regard to the revenue side of the Exchequer, any authority but what was expressly confided to them by Parliament. [THE LORD CHANCELLOR. — What is

\* 716 the meaning of the word \* "adapt" in the 26th section ?]

That word furnishes a strong argument against the exercise of the general power now claimed by the Barons; error being allowed in certain cases, bail was to be given by the party bringing error; but as the Attorney-General might bring error, it was of course needless to call on him to give bail in error, and the Barons were therefore to adapt the provisions of the Common Law Procedure Act to such a case. That would properly come under the description of practice. That matter illustrates the construction which the Legislature intended should be put upon the word "adapt," in the 26th section.

The rules cannot be supported as founded on the first part of the 26th section; but if so, then the contention, founded on the words "process, practice, and mode of pleading," in the second part of the section, is at end, for their meaning is no more extensive in the second than in the first part. If there is already a right of appeal, the Barons have the power to regulate the steps by which that right may be enforced; but they cannot create a Court for that purpose. A right of appeal cannot be given by inference; it must be created by express words, *The King v. Hanson*,<sup>1</sup> *The Queen v. Stock*.<sup>2</sup> The 32d section of the Act of 1854

<sup>1</sup> 4 B. & Ald. 519, 521.

<sup>2</sup> 8 A. & E. 405.

shows that this must be so even in the proceedings of the Common Law Courts themselves, for that section creates the right to appeal against a judgment on a special case as on a special verdict, which would not have been necessary if the Court could have treated the difference as one of mere form, and made rules accordingly. There are no words in the Queen's Remembrancer's Act which give this right of appeal, and the Court of Exchequer cannot give it under words which \*only by inference can be \*717 supposed to point to it. The rules are bad, since they assume to direct not only what is to be done in the Court of Exchequer itself, but also in the Court of Error, the Exchequer Chamber, or this House. As to proceeding in error, Tidd,<sup>1</sup> speaking of it, says: "All the proceedings which have been hitherto mentioned are in the Court below, where the judgment was given; but henceforth they are in the Court above, to which they are removed." Chitty's Archbold<sup>2</sup> is to the same effect. And many authorities to the like purport are collected in Dickenson's Sessions Cases (6th ed. p. 626). It never was permitted to any Court to say whether its judgment should be subject to appeal or not. Even in the Colonial Courts they can only grant or prevent appeals in particular cases,<sup>3</sup> but cannot themselves make general rules, granting or taking away the right of appeal. The right of appeal from a decision pronounced in the Court of Exchequer cannot be said to be part of the process, practice, and pleading in the Court of Exchequer; yet unless that can be contended, there is no pretence for saying that the words of the section justify these rules.

If Parliament had said that the procedure on the two sides of the Court was to be made uniform, it might possibly have had the effect of giving this appeal; but, first, that would have been by the power of Parliament, and, next, if Parliament had so said, it would not have enacted the previous sections, which introduced special matters of change, and made particular provisions for specific cases, as, for example, in the cases of appeals against \*decisions on proceedings for succession and legacy duties. \*718 It is clear that those appeals would not have existed but for the express direction given in the statute. The Barons had no authority of their own to create an appeal in such cases.

Then, again, the rules are made to apply to causes then pend-

<sup>1</sup> 2 Tidd, Pr. 1161, 9th ed.

<sup>2</sup> Clark on Colonial Law, tit. Appeals.

<sup>3</sup> Page 580.

ing. That is objectionable. The operation of the 34th section of the Act of 1854 is prospective only, *Vansittart v. Taylor*.<sup>1</sup> [LORD WENSLEYDALE. — That case arose on a question of assent by the parties. Can you reserve a case for the consideration of the Court without the implied assent of the parties?] Perhaps not; but that case shows that when the assent was given, which would have the effect of submitting a case for the decision of the Queen's Bench, a change in the law would not have the effect of making it an assent to going further, and taking the opinion of the Court of Exchequer Chamber. Mr. Baron Parke there said,<sup>2</sup> "I take it to be a clear rule of law that the language of a statute is *prima facie* to be construed as prospective only." *Hughes v. Lumley*<sup>3</sup> had previously laid down the same rule with regard to the 32d section of the statute, and *Jenkins v. Betham*<sup>4</sup> applied it to the 34th and 35th sections. It cannot be supposed that the Legislature intended that a party who gained a verdict at a trial should have his right to retain that verdict affected by a statute, still less by new rules of Court, coming into operation after the trial. The principle was established in the case of *Moon v. Durden*,<sup>5</sup> with respect to the 8 & 9 Vict. c. 109, which was held not to defeat an \*719 action upon a wager commenced before the \*statute passed, and it was applied in *Pinhorn v. Souster*<sup>6</sup> to pleadings demurred to before the Common Law Procedure Act of 1852.

*The Attorney-General*, in reply. — It may be admitted that an appeal must appear to be given by a proper construction of what the Legislature has said; that is all that *The King v. Stock* decides, and that case was founded on a dictum of Lord Tenterden, uttered in *The King v. Hanson*. But here a proper construction of the statute shows that an appeal was intended to be given, for there is an express authority to the Barons, to "extend, apply, and adapt any of the provisions" of the Common Law Procedure Acts, and of the rules of pleading and practice, to the revenue side of the Court, so as to render the process, practice, and mode of pleading uniform on the two sides of the Court. The right of appeal did exist on the plea side, and if the two sides of the Court were to be

<sup>1</sup> 4 Ellis & B. 910. But see *Wright v. Hale*, 6 H. & N. 227.

<sup>2</sup> 4 Ellis & B. 914.

<sup>3</sup> 2 Exch. 22.

<sup>4</sup> 4 Ellis & B. 358.

<sup>5</sup> 8 Exch. 138.

<sup>6</sup> 15 C. B. 168.

rendered uniform in their practice, it must be by introducing it on the revenue side of the Court. The statutory declaration that a proceeding to error shall be a step in the cause, is not a matter of form, but substance, and is, in fact, a recognition of the right of appeal.

As to the retrospective operation of the rules, the cases cited only show that the substantive rights of the parties are not to be retrospectively affected; but they do not show that the Court may not, the instant after the passing of a statute, regulate the proceedings taken to enforce those rights in conformity with its provisions; and in that way a party may even incur a new liability to costs, \* *Freeman v. Moyes*.<sup>1</sup> *Cox v. Thomason*.<sup>2</sup> \*720 *Wright v. Hale*.<sup>3</sup>

THE LORD CHANCELLOR (LORD WESTBURY).—My Lords, this appeal depends on the question whether the rules made by the Court of Exchequer on the 4th of November, 1863, are warranted by the power contained in the 26th section of the 22d and 23d year of the Queen, commonly called the Queen's Remembrancer's Act.

The second Common Law Procedure Act, which passed in the year 1854, contains many important enactments with reference to the jurisdiction of the superior Courts of common law, and some of the most important are the provisions that create new rights of appeal. In jury trials at common law, grave questions frequently arise, and are decided on motions for a new trial, or on rules to enter a verdict or nonsuit, but from the decisions of the Court so given there was not, before the Act of 1854, any right of appeal.

The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given, must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the Court of the First Instance, and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation

<sup>1</sup> 1 A. & E. 338.

\* 6 H. & N. 227.

<sup>2</sup> 2 Crompt. & J. 498.

of a new right of appeal, which is in effect a limitation of  
 \* 721 the jurisdiction of one \* Court, and an extension of the jurisdiction of another. A power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction. Accordingly it was necessary in the Act of 1854, not only to give new rights of appeal, but to define and bind certain Courts to entertain the appeals so given, and this is done by the 36th section of the Act, which declares that the Court of Error, the Exchequer Chamber, and the House of Lords, shall be Courts of appeal for the purposes of the Act.

The Common Law Procedure Act of 1854 was, like the Act of 1852, limited to the superior Courts of common law, and from the manner in which the Act was expressed, these words intentionally excluded that Court which is called the revenue side of the Court of Exchequer. It required, therefore, another exercise of legislative authority to make the special provisions of the Act of 1854, which had created new rights of appeal in the other Courts, applicable to suits as between the Crown and the subject in the Court on the revenue side of the Exchequer. This was clear in 1859. In making the orders now in question, the Barons of the Court of Exchequer have assumed that a discretionary power to exercise this legislative authority or not, and thereby to confer, or to withhold, this important benefit of new rights of appeal, has been given to them by the 26th section of the Act of 1859. If the Legislature has done this, it has done a thing which is very irregular, and which antecedently would seem to be very improbable.

It is not reasonable to suppose that in matters affecting the taxation of the subject, the Legislature would abdicate its own functions and delegate to the Barons of the Exchequer the power of determining at their pleasure whether, in certain cases, there should or should not be a right of appeal as between the subject and the Crown.

\* 722 \* This improbability is much increased when attention is directed to the particular provisions of the statute in question; the Queen's Remembrancer's Act. The 10th section embodies and applies (with some slight difference) to the revenue side of the Court, the provisions as to error and appeal contained in the 46th section of the Common Law Procedure Act of 1852, and the 32d section of the Act of 1854.

New rights of appeal are created and regulated by the 12th, 13th, 14th, and 15th sections. By the 16th section special legislative provisions as to the examination and attendances of witnesses, together with the provisions contained in the 46th, 47th, 48th, and 49th sections of the Act of 1854, are expressly extended to suits and proceedings on the revenue side of the Court of Exchequer; and in the 18th and 19th sections are contained express enactments regulating proceedings in error on the revenue side of the Court, and embodying the 146th and 147th sections of the Act of 1852; and by the 20th section, the power of appealing to a Court of error by means of a bill of exceptions, is for the first time created on the revenue side of the Court.

Suits, therefore, between the Crown and the subject on the revenue side of the Exchequer are by these express enactments put on the same footing with respect to proceedings in error as suits between subject and subject in the Courts of common law, with the exception only of the right of appeal from interlocutory orders given by the 34th and 35th sections of the Act of 1854. It is difficult to resist the impression that these last-mentioned rights of appeal were intentionally omitted by the Legislature as not being expedient in revenue cases; but it is much more difficult to accept the proposition of the Crown that these rights were left by the Legislature to be conferred or not, at the pleasure of the Chief Baron and two or \* more Barons of the Court of Ex- \* 723 chequer. These improbabilities and difficulties must of course yield to any enactment expressly declaring that such is the intention of the Legislature, but they are of sufficient weight to render it necessary that the language of such alleged enactment shall be clear and unequivocal, and not admit of any other reasonable construction.

With these observations, we come to the construction of the 26th section of the statute. It contains two distinct powers given to the Lord Chief Baron, and two or more Barons of the Court.

By the first power they are authorised to make rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court. Here the word "practice" is used in the common and ordinary sense, as denoting the rules that make or guide the *cursus curiæ*, and regulate the proceedings in a cause within the walls or limits of the Court itself. Under this power any rule might be laid down by the Barons for the guidance of their own

proceedings that did not require express legislative sanction. By the second power, conferred by the 26th section, the Lord Chief Baron and two other Barons are authorised to extend, apply, and adapt to the revenue side any of the provisions of the Common Law Procedure Acts of 1852 and 1854, and any of the rules of pleading and practice on the plea side as may seem to them expedient for that purpose, that is, for the purpose of making the “process, practice, and mode of pleading on the revenue side as nearly as may be uniform with the process, practice, and mode of pleading on the plea side.”

First, it is admitted on all hands, and if not it is clear, that the provisions in the Acts of 1852 and 1854, which may be thus extended, applied, and adapted, must be provisions relating to process, practice, and mode of pleading. Uniformity of process, practice, and pleading \* 724 on both sides of the Court is the object of the power, and defines its extent.

Secondly, it is very difficult to give to the words “process, practice, and mode of pleading” in this second power a different meaning or extent of signification from that which they bear in the first power, given by the prior part of the section.

Taking, then, the word “practice” as equivalent to the *cursus curiæ*, or regulations of proceedings within the Court itself, the question is whether the 34th, 35th, and 36th sections of the Act of 1854 can, with any propriety of language, be denominated provisions or rules respecting process, practice, and mode of pleading. This is a question of verbal nicety, depending on nice shades of meaning in a word. The 34th, 35th, and 36th sections of the Act of 1854 create, as I have said, new rights of appeal. An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal. The mode of proceeding may be regulated partly by the practice of the inferior, and partly by the practice of the superior tribunal; but the appeal itself is wholly independent of these rules of practice. The right to bring an action is very distinct from the regulations that apply to the action when brought, and which constitute the practice of the Court in which it is instituted. So the 34th and 35th sections of the Act of 1854 which create new rights of appeal, and the 36th section which defines and binds certain Courts to receive and determine such appeals,

cannot with any accuracy or propriety be termed provisions which relate to process, practice, or mode of pleading, either in the Court appealed from, or that to which the appeal is to be made. They are enactments creating new relations between certain

\* Courts in cases which are defined, and they are as distinct \* 725 from rules of practice as international is distinct from municipal law.

On reading the rules in question, which profess to have been made under the authority of the 26th section of the Queen's Remembrancer's Act, no one using the common language of lawyers would call them provisions relating to the practice of the Court of Exchequer on the revenue side. For the third rule is that the Court of Error, the Exchequer Chamber, and the House of Lords, shall be Courts of appeal for this purpose; that is, for the purpose of the appeal given by the first and second rules; and the sixth, seventh, eighth, and ninth rules prescribe the duty and define the authority of these Courts of appeal. These rules are so many legislative enactments purporting to create a new jurisdiction in the Court of Exchequer Chamber and House of Lords, and prescribing the mode in which such new jurisdiction shall be exercised. It is simply an incorrect use of language to call such enactments provisions respecting the process, practice, or mode of pleading in the Court of Exchequer; but unless they can be properly and strictly so denominated, there is not, in my opinion, any authority to make such rules conferred by the 26th section of the Act in question.

The principal argument of the Attorney-General was, that the words "process, practice, and mode of pleading" were equivalent to the word "procedure," and that the word "procedure" denotes the whole course of a cause, from its commencement in the Court of First Instance until its final adjudication in the ultimate Court of Appeal; and he then contends that a provision giving a new right of appeal may be properly termed a provision relating to the procedure in a cause. I cannot accept either of these two positions. The words "process, \* practice, and mode of \* 726 pleading" are not used in the abstract, but always with reference to some Court or Courts; and so used, they have a well-understood and definite meaning. They are used in the 26th section in connection with the plea side and revenue side of the Court of Exchequer, and properly denote the proceedings in a cause on either side within the walls of that tribunal. They have no extra



territorial operation, but if they received the larger construction of the Attorney-General, it would follow that under the 26th section the Barons of the Exchequer would have power to make rules as to procedure in the House of Lords, — which would be absurd.

It was also urged by the Attorney-General that the proceeding to error is now made a step in the cause; that it is a step in procedure, and if procedure be, as he contends, equivalent to process, practice, and mode of pleading, it is a step within the meaning of those words. The fallacy of this ingenious verbal argument lies, as I have already observed, in taking the word “procedure” in the abstract, and substituting it for “process, practice, and mode of pleading,” also taken abstractedly; that is, taken in a sense and manner in which they are never found in the Acts in question. The words “step in the cause” are used, as is well known, for the purpose of denoting that in future it should not be necessary to sue out a new writ for the purpose of entering a Court of error.

But it has been further contended that, inasmuch as by the 20th section of the Queen’s Remembrancer’s Act the proceeding by bill of exception is extended to the revenue side, by which any error or omission in the ruling of a Judge at the trial may be brought before a Court of error, the giving of an appeal from the judgment of the Court in Banco in the same question of error

\*727 \* in the ruling, is no more than a regulation of form, and not the introduction of a new right of appeal.

But the observation is not correct in point of fact, for the bill of exceptions is tendered to the ruling of the Judge at the trial, whereas the appeal created by the 35th section of the Act of 1854 is from a different judgment, namely, the decision of the Court in Banco. But the answer to the whole of this argument is, that although the bill of exceptions was a well-known proceeding in the Courts, except on the revenue side of the Exchequer, anterior to the year 1854, yet the Legislature deemed it necessary to create the new rights of appeal which are given by the 34th and 35th sections of the Act of 1854, by express enactments for the purpose. This argument, therefore, by bringing into immediate contrast the express mention of the proceedings by bill of exceptions, with the total silence of the Legislature, as to the appeals given by the 34th and 35th sections of the Act of 1854, serves to confirm the conclusion that the Legislature deliberately abstained from extend-

ing to suits on the revenue side the provisions contained in those sections.

It was strongly contended by the respondents that even if the Barons of the Exchequer had power to make the rules in question, they had no power to make them apply to pending proceedings, and that the attempt to do so was unjust.

This argument is not, in my opinion, well founded. Many of the enactments contained in the Queen's Remembrancer's Act are so worded as to be applicable at once to pending proceedings. If, therefore, these rules are warranted by that statute, there can be no injustice in making them apply to pending proceedings, so long as they apply equally and impartially to both sides.

Still it is a subject of deep regret that any rules should \* have been made expressly with a view to the determina- \* 728  
tion of a particular cause. Four years had elapsed since the passing of the Queen's Remembrancer's Act, and the necessity of these rules had never occurred to the Barons of the Court of Exchequer. On the eve of the argument of the motion for a new trial in this important case, the rules in question were made without the time necessary for due deliberation. The result is, that the efforts made to settle a question of the gravest importance, most essential for the guidance of the government of the country, and regarded with great expectation, have been rendered abortive, or rather, to speak more correctly, the *mons parturiens* of this great cause, raised with so much labour and expense, will produce nothing but the ridiculous issue of some discordant opinions on the meaning of the word "practice."

I therefore have to move your Lordships that the appeal of the Crown be dismissed with costs.

LORD CRANWORTH. — My Lords, on the argument of this case at your Lordships' bar, two questions were raised: first, had the Barons of Exchequer the power to make the rules in question? Secondly, if they had, could they make them so as to operate on a defendant who had already obtained a verdict?

The first question depends entirely on the 26th section of the 22 & 23 Vict. c. 21. That section contains two members. I do not consider it necessary to discuss what rights the Court had under the first; but by the second part of the clause, the Chief Baron, and two or more Barons are authorised from time to time by

any rule or order to extend any of the provisions of the Acts of 1852 and 1854 to the revenue side of the Court, as may  
 \* 729 seem \* to them expedient, for making the practice on the revenue side of the Court, as nearly as may be, uniform with the practice on the plea side.

By the second of the rules of the 4th of November, 1854, it was provided (amongst other things), that in all cases of motions for a new trial upon the ground of misdirection by the Judge at the trial, if a rule to show cause be granted, but afterwards discharged, then the party decided against may appeal, if there is a difference of opinion among the Judges; or if the Court gives leave to appeal.

There is a provision in the Act of 1854, § 35, giving to the suitor this power of appeal in such motions on the plea side of the Court. Therefore, looking only to the words of the statute, the rule was certainly authorised, if it would tend to make the practice on the revenue side of the Court more nearly uniform with that on the plea side.

Did, then, the alteration thus introduced by the second rule tend to make more uniform the practice on the two sides of the Court? I cannot doubt that it did. If by the word "practice," as used in the statute, we are to understand the whole course of procedure from the commencement of a suit to its close by final judgment and execution, there can be no doubt that under the rule in question the practice on the revenue side was made more uniform with that on the plea side. In fact, the practice so understood was made the same on both sides of the Court. I strongly incline to think that in construing a remedial Act like that now under consideration, we may fairly adopt the liberal interpretation of the word "practice." When the Legislature sanctions the doing of certain acts for the purpose of making the practice on the revenue side of the Court more uniform with that on the plea side,  
 \* 730 it is not unreasonable to understand it as \* meaning the practice in revenue causes, — that is, the practice in every stage of their progress, from the commencement to the end. But in my view of the case, it is not necessary that I should rely on this more extended sense of the word "practice"; for even supposing the "practice" referred to in the statute to be confined to that in the Court of Exchequer itself, and to have no reference to the mode in which the cause is to be dealt with after it has left

that Court, still I think the rule in question tended to make more uniform the practice on the two sides of the Court. I must here remark, that the power conferred by the 26th section is not a power, as was assumed at times in the arguments, to introduce clauses relating to process, practice, or pleading, but a power to introduce any provisions of the previous statute which may tend to make the process, practice and pleading on the two sides of the Court more uniform.

On the plea side a suitor has two modes of bringing any misdirection of the Judge at the trial under the review of the Courts of error. He may tender a bill of exceptions at the trial before the jurors have determined their verdict, and then, by proceeding in error, bring the question as to the ruling of the Judge before the successive Courts of error, or after verdict he may move the Court of Exchequer for a new trial, and if dissatisfied with the judgment there given, he may appeal. Whichever course is taken, the question whether the Judge has ruled according to law may be subjected to the review of the Exchequer Chamber, and afterwards of the House of Lords.

On the revenue side of the Court only one of these courses was, before the promulgation of the rules, open either to the Crown or to the defendant. Either party might tender a bill of exceptions, and so bring the matter before the Courts of error. But if, instead of taking that \*course, he preferred to move the \*731 Court of Exchequer after verdict for a new trial, there was then no mode of questioning in the Courts of error the ruling of the Judge at the trial.

The effect of the new rules of Court is, to enable the party, whether the Crown or a subject, dissatisfied with the judgment of the Court of Exchequer on such a motion, to appeal to the Courts of error, thus making the mode of bringing before the Courts of error the question whether the ruling of the Judge at the trial was correct, the same on the two sides of the Court.

This may surely be treated as an alteration of practice in the Court itself. There are two passages to the Courts of error, by either of which a suitor on the plea side may bring under the review of those Courts an alleged misdirection of the Judge at the trial, the one notoriously inconvenient and hazardous, the other easy and safe. Before the promulgation of the rules, a suitor on the revenue side could only proceed by the former course. Under

the rule in question, the latter course is opened to him as to the suitor on the plea side. I think this must be deemed to make the practice more uniform on the two sides of the Court itself.

If I am wrong in coming to this conclusion, then I should not think the rule in question was warranted, for, as I construe the statute, there was no power given to the Judges of the Court to extend any of the provisions of the two former Acts to the revenue side of the Court, unless by so doing they would make the process, practice, or mode of pleading on the two sides of the Court more nearly uniform. The construction of the 26th section of the statute seems to me to require that the words at the end of it, which indicate the purpose for which the rules might be made, should be read as applying as well to the power of extend-

\* 732 ing the provisions of the former Acts to \*the revenue side of the Court, as to the power of so extending the rules of pleading and practice on the plea side of the Court. In the further observations therefore which I am about to make, I must assume that the rule in question did tend to make the practice on the two sides of the Court more nearly uniform.

But even supposing that to be so, still it was said there are considerations which ought to satisfy your Lordships that no power of making such rules was intended to be conferred on the Judges : first, because it is absurd to suppose that it could have been intended to delegate to the Judges of a Court the power of saying that any decision of theirs, should be capable of being brought for review before the Exchequer Chamber, and ultimately to this House ; and, secondly, because there are clauses in the Act itself inconsistent with the hypothesis that any such power was in fact conferred.

On the first ground I am far from disputing that cases may be suggested, in which a strict adherence to the language of a statute, whereby powers are conferred on a Court or other body, would lead to consequences so absurd or inconvenient as to make it necessary to understand the Legislature as having used the words in question not in their ordinary sense ; but I cannot discover any such necessity here. Suppose the clause authorising the application of any of the provisions of the former Acts to the revenue side of the Court had in terms included those provisions which related to appeals, what would there have been absurd or inconvenient in such an enactment ? It might have been unusual, but that

would have been all ; and I know of no principle which justifies us in departing from the ordinary interpretation of words merely because they confer unusual powers. I incline to think that I should have taken this view of the case even if there had been no power of bringing under review the \* ruling of the \* 733 Judge. But here the very question as to which a right of appeal to the Courts of error is given by the rule now under consideration, might have been brought by bill of exceptions under review of the same Courts.

Consider the question, first, when the decision of the Court of Exchequer is conformable to the ruling of the Judge, and when, therefore, the application for a new trial is refused. In every such case the right of appeal is merely a right in the party complaining of misdirection to bring, by a new and less difficult mode, before the Courts of error the same question which he might have brought before them by a more cumbrous and complicated mode of proceeding, that is to say, a right to proceed, so as to raise the matter in dispute by appeal on a new trial refused, instead of by bill of exceptions. The rule in such a case is merely the extending to the revenue side of the Court a clause, or clauses, of the Act of 1854, likely to make the practice on the two sides of the Court more uniform. It gives to the suitors in causes on the revenue side of the Court the same facilities of getting out of the Court below, and reaching the Courts of error, which are possessed by the suitors on the plea side. It does not give substantially any new right of appeal ; for, looking to substance, not to form, the party appealing is only doing what he might have done by bill of exceptions.

The case, though equally clear, is not so simple where the Court of Exchequer decides against the ruling of the Judge, and so awards a new trial. The party dissatisfied with that decision would, independently of the rules, be compelled to go down to a new trial. The Judge presiding at that trial would, as a matter of course, state the law to be as it had been settled by the Court. The party dissatisfied with that decision might then object to the law \* so laid down, and call on the Judge to state \* 734 the law to be as it had been expounded by the Judge at the former trial ; and on this being refused, as it must be refused, he might tender a bill of exceptions, and so bring the question before the Courts of error. The effect of the rule in question is, to en-

able him to bring before the Courts of error, by appeal, the same question which he might have brought before them by bill of exceptions, but only after incurring the useless and expensive delay of a new trial. Whether, therefore, the Court of Exchequer may have decided against the motion for a new trial, or in favour of it, the effect of the rule is to enable the suitor on the revenue side of the Court, who considers himself aggrieved by the ruling of the Judge at the trial, to reach the Court of Error by the same easy course which is open to the suitor on the plea side.

I am aware that the Courts of error, on an appeal, have larger powers than they can exercise on a bill of exceptions. On a bill of exceptions they have only to say whether there has or has not been misdirection. If there has, the duty of the Court of Error is simply to award a *venire de novo* ; if there has not, to refuse it. But on an appeal to the Court of Error, the Court is bound to give such judgment as the Court below ought to have given. Now, on a motion for a new trial on the ground of misdirection, it is by no means necessarily the duty of the Court to grant a new trial, even where there has been misdirection. The Court may see clearly that the jury could not have been, and had not been misled, and then a new trial may be justly refused ; or the Court may see that it ought only to be granted on terms ; as, for instance, if a material witness has died since the trial, the Court may refuse a new trial,

unless the complaining party consents to allow the evidence  
 • 735 of the deceased witness on the \* former to be read on the new trial. Many other instances of the same kind might be adduced. All these circumstances are to be considered by the Court of Error on an appeal, which would be out of place on a bill of exceptions. But it surely cannot be an argument against the power to make the rule now complained of, that it enables the Court of Error to do more substantial justice when the case is before it than could have been done independently of the rule.

On these grounds I have to come to the conclusion that even if the power to grant a right to appeal, where no means previously existed of bringing the matter complained of before the Courts of error, would be so unusual and strange, that language apparently conferring it must be construed otherwise than according to its ordinary meaning, still here there not only is no such anomaly, but the power conferred is, in fact, only a power enabling the Court to authorise its suitors to obtain the judgment of the Court

of Error more simply, more expeditiously, more cheaply, and more effectually, than they could have done under a more complicated course of proceeding.

It was, however, argued for the respondents, secondly, that there is evidence deducible from other clauses of the statute, showing that it was not intended to confer on the Judges of the Court of Exchequer the power to make such rules as those under consideration. This argument rested mainly on the fact, first, that a right of tendering a bill of exceptions is given, but not an appeal on new trial motions; and, secondly, that a right of appeal is given by different sections of the Act, from the decision of the Exchequer in some other cases, and the inference it was said is, that where a right of appeal was intended, it was given expressly, and so that it would be unreasonable \* to suppose that the Legis- •736  
lature meant to delegate to the Court the right of declaring whether there should or should not be a right of appeal in cases where no such right is, in terms, conferred by the Act.

In order to estimate the force of this argument, we must assume that but for the other sections of the Act there was authority given by the 26th section to make the rules in question. If that is so, then the question is, whether the other sections make it plain that the power conferred by the 26th section did not extend to cases to which but for those sections it would have been applicable; in other words, that the 26th section must be read as if there was in it a proviso declaring that nothing therein contained should be deemed to enable the Chief Baron and two Barons to make any rule empowering any suitor on the revenue side to bring before the Courts of error any question as to (*inter alia*) the ruling of a Judge at Nisi Prius, otherwise than by a bill of exceptions. Unless the effect of the clauses relied on can be carried to that extent, they do not sustain the argument of the respondents. I cannot attribute to them any such effect. The clause giving the right to tender a bill of exceptions was clearly necessary, for there could have been no right, under the 26th section, to extend to the revenue side of the Court the provisions of the Statute of Westminster. So as to the right of appeal given in cases of summary proceedings under the Legacy Duty and Succession Acts; they were wholly out of the purview of the Common Law Procedure Acts. The only clause really raising any question on this part of the argument is the 10th, which is taken partly from the Act of 1852 and



partly from that of 1854. Mr. Justice Willes considers that the general powers conferred by the 26th section of the Act of the 22 & 23 Vict. c. 21, would not extend to the case \* 737 \* contemplated by the 10th section of the same Act, or, at all events, that it is very doubtful whether they would; and he gives his reason for that opinion. I am far from saying that he is wrong in the view which he has thus taken; but even if he is, all that can be said is, that there is one case which has been specially provided for by the Legislature, for which, if it had not been provided for, the Judges might, under their general powers, have made adequate provision. I do not feel called on to find reasons why this distinction was made. Perhaps it was thought so important to enable the parties to obtain the judgment of the Court without the expense of a suit, as to make it expedient to introduce this 10th section, formed by uniting together the 46th section of the Act of 1852 and the 32d section of that of 1854. Be that as it may, I cannot attribute to the circumstance that express provision is made for giving an appeal in one particular case so much weight as to collect from it that the words of the 26th section, which purport to give a general power embracing that case, could not have been meant to have the operation which they would have had if the special enactment had not existed.

On these grounds I have come to the conclusion that the rule giving a right of appeal from a decision of the Court, whether granting or refusing a new trial on the ground of misdirection, was warranted by the 26th section as being a rule tending to make the practice on the two sides of the Court uniform; that there is no absurdity or inconvenience in construing the words of the Act according to their literal import; that so construed, they conferred on the Judges of the Court of Exchequer the power to make the rule authorising an appeal when the Court refused or granted a new trial, applied for on the ground of misdirection, and \* 738 that there is nothing in the \* other clauses of the Act showing that no such power was intended to be given.

If your Lordships decide in conformity with the opinion which has been expressed by my noble and learned friend the Lord Chancellor on the question of the construction of the 26th section, the second point made at the bar as to the retrospective effect of the rules, does not arise; but should it become necessary to decide it, I think the answer given at the bar is satisfactory.

The authorities show that when new arrangements come into force for regulating procedure, they operate on pending as well as future suits. Where this principle has been acted on, as it has often been acted on, with reference to costs, I cannot quite reconcile my mind to what has been done.

Here, however, the *nova constitutio* was merely a regulation calculated, or supposed to be calculated, to make more sure the ultimate attainment of justice. It operated equally on both parties, and, according to all the authorities, affected existing as well as future suits.

In this branch of the question, the right to make the rules prospectively must be assumed; and it is considered that where a suitor comes before the Court, he does so merely to obtain his right, whatever that right may be. He is not allowed to complain of any rules or orders lawfully made by the Court for the better attainment of justice, merely because they have been made after he has placed himself within its jurisdiction.

On these grounds, I think that the Court of Exchequer Chamber ought to have entertained jurisdiction.

LORD ST. LEONARDS. — My Lords, upon this case I have certainly formed a \*very decided opinion, and I regret to \*739 be compelled to speak so strongly, from the respect which I feel for the learned Judges out of this House, and for some of my noble and learned friends in this House who entertain a different opinion.

My Lords, I propose, in the first place, to ascertain what the true construction of the Act is standing alone. I assume, first, that the question of appeal had not given birth to the orders; then would the Act of 1859, by its own force, have executed its own declared intention? The framers of that Act had before them the two Common Law Procedure Acts of 1852 and 1854, and other Acts bearing upon the object in view; and from these they collected and adopted such of their provisions as they thought could be properly applied to the revenue side of the Court of Exchequer; for we must not lose sight of the peculiar duties and jurisdiction of that branch of the Court, and the care which the Court and the Crown lawyers would naturally take to prevent any alteration in the jurisdiction which was likely to affect the power of the Court or the interests of the Crown. It is precisely the case in which

we should expect to find the intention carried into operation through the aid of Parliament, to be expressed in clear language, and nothing left to inference or implication.

I may premise that, as far as intention is expressed, nothing can be more clear — whether the matter in dispute is left to implication, or is amongst the things expressed, I shall presently consider. The Act is, as we should expect to find it, technically drawn, and we are bound to construe it accordingly.

The object of the Act was to simplify the proceedings on the revenue side of the Court, to define the rights of appeal \* 740 intended to be given, and to give rights of appeal \* on subjects newly created; for example, Succession Duty and Legacy Duty.

The first section which is material to our purpose, is the 9th, which adopts section 222 of the Common Law Procedure Act of 1852 for the amendment of errors. The next provides for proceedings on a special case by consent of parties and order of a Judge, upon which error may be brought as if on a judgment on a special verdict. This section is compounded of section 46 of the Common Law Procedure Act of 1852, and section 32 of the Common Law Procedure Act of 1854; and the succeeding section simply provides for costs.

By the four succeeding sections a new right of appeal is expressly created from the Court of Exchequer under the Succession Duty Act. They direct how the Court of Appeal is to act, and they direct that such appeal shall be made to the Court of Error in the Exchequer Chamber, whose decision shall be subject to appeal to this House. And also a right of appeal is given in summary proceedings for succession or legacy duty.

Observe how well and clearly the Act executes its own object! When it means an appeal, it expressly says so, or as clearly uses words equivalent to it.

The next section extends to this Act of 1859, the provisions of an Act of Wm. 4 for the examination, &c. of witnesses, and once more selects four sections from the Common Law Procedure Act of 1852, which relate to the proceedings and powers of Courts of error.

Recourse is then had to a previous statute of the 2 & 3 Vict. c. 22; and adopting that Act, it enables a Judge at Nisi Prius to hear a revenue cause without any commission from the revenue side of the Court.

The Act once more adopts three sections, sections 17, 18, and 19 of the Common Law Procedure Act of 1852, \*limiting the period within which error may be brought, \*741 and abolishing writs of error; and it carefully provides against the retrospective action of the latter provision, and gives, where it intended to do so, power to the Barons to make certain orders as to bail. It was necessary to do so, and it was done.

It still remained to secure a general right of appeal on the trial of issues arising on the revenue side of the Court, and this was expressly accomplished by enacting that either party may tender a bill of exceptions. This is an original provision, and thus an old right was introduced for the first time on the revenue side of the Court of Exchequer.

This, then, left the Act complete as regarded substance; every thing material, and requiring the power of Parliament, is expressly, and not by implication, provided for. Particular modes of appeal are selected, and others rejected. New rights are created. The Act of Parliament is the charter of the revenue side of the Court. As regards form, section 26, which I must consider more at large by and by, provides power for the Barons to make rules and orders as to the process, practice, and mode of pleading.

The Act worked well. The learned Barons understood their power under section 26, according to the common meaning of the words; and they accordingly, in 1860, made extensive orders (amounting to 146) for the regulation of the process, practice, and mode of pleading on the revenue side of the Court, and more especially with regard to proceedings in error. Several of the provisions of the Act of 1852 were adopted, so far as they were applicable; and in 1861 the Barons issued some further orders for similar objects, but no attempt was made to \*create any \*742 new right of appeal, or to incorporate the appeal clauses now before your Lordships.

In 1860 (the year after the Queen's Remembrancer's Act was passed) another Act was passed, once more to amend the process, practice, and mode of pleading in the Courts, and for enlarging their jurisdiction; but no provision was made with regard to appeals from the revenue side of the Court of Exchequer. Two trifling powers theretofore confined to Courts of equity were extended to the common law Courts, and under the head of "appeal," express provisions in eight sections were made in regard to

the rights of appeal from the new jurisdiction. Therefore what Parliament intended, it carefully performed.

It would be worth your Lordships' while to look at the Act of Parliament. There are three small sections giving new powers; and then there is, in the body of the Act itself, the head of "appeal," with eight sections; under that head all of them expressly providing for rights of appeal in the most explicit terms. Parliament, therefore, as in the preceding Act, namely, the Queen's Remembrancer's Act of 1859, did not deal ambiguously in creating a right to appeal, but dealt expressly, as would men of business competent to perform the acts of legislation which they were called upon to perform, and told you plainly that which it was intended to enact.

My Lords, if we confine the Act to what it clearly expresses, we shall give full effect to every clause, and every word in every clause, according to their ordinary import. The 26th section admits of an easy construction, reading it by the light of the general provisions of the Act; and thus it was construed by the Court of Exchequer up to last November.

But at that period the Crown in this case had lost or  
 \*743 \*abandoned its right by bill of exceptions; and its only remedy against the verdict of the jury in favour of the defendants, was to move for a new trial in the Court of Exchequer. And it was at once seen that as the Act of 1859 stood, there would be no right of appeal on the part of the Crown if the Court of Exchequer should refuse to disturb the verdict; and therefore, to provide a right of appeal, the Barons, by their orders of the 4th of November last, applied to the revenue side of the Exchequer all the provisions in regard to the right of appealing in the Common Law Procedure Act of 1854, sections 34 to 45, and directed them to have immediate operation, and to apply to every proceeding then pending. This was done to supply the right of which the Crown stood in need, and it has accomplished its purpose, if the orders were authorised by the 26th section.

My Lords, I say, and I repeat it — if the orders were authorised by the 26th section. That is the question. Now, my Lords, that section provides in these terms. [His Lordship read it; see *ante*, 709.]

Now it is clearly laid down that no right of appeal can be given except by express words. This I know will be questioned by my

noble and learned friend opposite; but he will admit that no such right can arise by implication or inference; nor indeed does the Crown deny that express words are required, inasmuch as the Attorney-General relies upon the words "process, practice, and mode of pleading," in the second part of section 26. But undoubtedly he was driven to much pleading to make these words authorise the creation of new rights of appeal.

What is the power claimed? That of creating new rights of appeal. Did Parliament intend to delegate this its own great power, without any check or control, to the very Judges whose decision is to be the subject \* of appeal? It is diffi- \* 744 cult to come to that conclusion. Every line of the Act negatives such a presumption. Observe how carefully it provides for new rights of appeal, where it did create them; and how laboriously it selected from the legislative provisions before it those which would accomplish its object; and how, with equal care, it excluded what it did not adopt. It did not leave either the Crown or the suitor without a remedy, an equal remedy. The very twelve appeal clauses enacted by the Barons were under the eyes of Parliament when the Act passed; they are sections 34 to 45 of the Common Law Procedure Act of 1854. Observe, section 32 of the Act of 1854 immediately preceding those adopted and enacted as law by the Barons of the Exchequer, is selected and adopted, and included in section 10 of the Act of 1859. And still more remarkably, sections 36 and 37 of the Act of 1854 are also properly selected and adopted in sections 13 and 14 of the Act of 1859. These two last-mentioned sections, 36 and 37, are amongst the orders too of the Court of Exchequer; but section 36 is not properly adapted by them from the Act of 1854, although it is quite correct in its original place in that Act. Why did Parliament so carefully and so openly reject the others of this set of clauses in the Act of 1854; for they formed one class? Can it be argued from inference or from implication, that where Parliament has not imported the whole set unbroken and entire, but has picked out one here and another there, leaving all the others out, it intended that the Barons of the Exchequer should, whenever they thought proper, take all or any of the clauses which had been thus carefully excluded from the mass? How is it possible that such an argument can be maintained? Provision was made for all the modes of appeal which Parliament intended to grant between the Crown

\* 745 \* and the subject; and that was the reason why they were selected.

If the alleged power was really created, it might have been exercised the day after the Act itself had received the royal assent. Would not this have been a surprise upon Parliament? Supposing the Barons of Exchequer, when the Act of Parliament was quite fresh, the next day after it had received the royal assent, had said, This is an imperfect act of legislation, but happily it enables us to supply what we think proper; we will take all those clauses and make them law, which Parliament, not knowing how to adapt them, has excluded, and then we will make a perfect Act of Parliament; Parliament would have been rather astonished. But that would have been no greater exercise of the power, and there would have been nothing more extraordinary than now exists in the exercise of that power at the moment in which the particular clauses were intended or required for a particular object. The very orders made under the authority claimed, show how great and dangerous is the power which Parliament is supposed to have delegated. If Parliament had itself thought proper to give to the revenue side of the Court of Exchequer the rights of appeal claimed to be created by the Barons, in addition to those expressly provided by the Act, look at the deliberations, the three readings, and committees, &c. in both Houses, and the royal assent, and the time for consideration. Whereas, under the delegated power, a transcript from the Act of 1854, signed in chambers by the Barons of Exchequer, operated at once as an Act of Parliament; I say at once, because such is the express provision in the orders. I may perhaps venture to say that no such provision would have been made by Parliament *pendente lite*.

It is said that the orders operated for the equal benefit

\* 746 \* of the subject and of the Crown. This, I think, has not been established. It was foreseen that in the event of the Court of Exchequer refusing the motion for a new trial, the Crown would be stopped from further proceedings unless a new right of appeal were created. The orders, if valid, gave that right, in the event which has happened, to the Crown at the expense of the defendants, who would have to follow the Crown in its appeal to a higher tribunal, in order, if they could, to maintain the verdict of the jury in their favour. Now, if the orders were invalid, the parties would seem to stand thus: the Crown would be absolutely

defeated if the new trial was refused, and the defendants would be successful. But suppose a new trial to be ordered, the defendants would not have been defeated, but the litigation would proceed; and in the result, the defendants might be able to appeal to the highest tribunal. A judgment against the Crown would be final; but a judgment against the defendants would not.

It appears to me, therefore, subject to correction, that the Crown obtains under the orders, if they are valid, an advantage over the subject. Indeed, although this may not be so, or the consequences may not have been foreseen, the orders were issued to meet the difficulty which the Crown had to surmount. That the Barons of the Exchequer, for whom I entertain the highest respect, acted with the purest intentions, no one can doubt. But the *ex post facto* operation of the orders, if valid, would of itself have led me to the conclusion that Parliament had not given, nor shown any intention to give, a power of such an objectionable nature. This very exercise of the power to that extent appears to me to show conclusively that no such power thus attempted to be exercised could have fallen within the intention of the Legislature.

\* It was argued that the Barons of the Exchequer had \*747 full power over appeals. This, however, could give them no power to create new rights of appeal.

It was then urged that no new ground of appeal had been created; that as the Act of 1859 allows a bill of exceptions, it can, like the new order, only be for misdirection; that a bill of exceptions is full of difficulty, but that both being for the same cause, there is no new ground of appeal. This no doubt is so. But the answer appears to me to be, that a new right of appeal is given; and that Parliament, having had its choice of remedies, selected that of a bill of exceptions in clear terms — thus, by the simplest construction, excluding other remedies; whereas the orders add these excluded remedies for the same object; thus acting under an alleged delegation of legislative power in direct opposition to the authority of Parliament.

My Lords, I would compare the Act as it stands to a manufactory carefully constructed, and fitted by scientific men with machinery admirably adapted to its particular objects. It is still perfect in all its parts. It can execute all that it was intended to perform if you will but let it alone. Send a skilled workman, and he will at once know how to adapt the proper portion of the ma-



chinery to the work which he requires. An unskilled workman could not overlook the power of the machinery, but he would complain that there were simpler mechanical plans known, and with great simplicity he would ask that they might be added to the fixed machinery. "No," says the manufacturer, "my works are open to all men, but my machinery was selected as best adapted to the objects I had in view. I had before me the simpler schemes which you mention, and I deliberately rejected them, but still provided ample machinery to suit even your

\*748 \*purpose. Ask me not, therefore, to clog my works by the additions which you propose; they would introduce new forces which I do not require, and would greatly interfere with the action of my present works. If you come to my manufactory, you must use my machinery."

My Lords, upon these broad general views I should have been prepared to give my opinion against the orders in question; but after the opinions which have been delivered, and the arguments which have been addressed to the House, it is no doubt proper to review the special grounds upon which the Barons of the Exchequer claim to exercise legislative delegated authority to create a new right of appeal.

Now, I agree that to create such a right, it is not necessary to use the word "appeal," but some clear equivalent terms must be used. And if this be the rule where Parliament is executing its own purpose, how powerfully must it operate where it is delegating its legislative functions! We have a right to expect a clear and unambiguous expression of its intention, open to no doubt or cavil, nothing left to inference or implication. How slight is the labour just simply to say, that the authority given to the Barons shall extend to the other various rights of appeal contained in the Common Law Procedure Act of 1854, from which Parliament had already adopted such of the remedies as it thought fit to apply to the revenue side of the Court of Exchequer! And if this precision might be expected in any common case, here, we might be assured, it would not be omitted. What, would Parliament leave its intention on such a vital point open to so much ambiguity as to require arguments occupying several days to establish the true construction of the delegated power, and to lead to divided opinions amongst our learned Judges? And yet this is the

\*749 very \*Act of Parliament in which new powers of appeal

on the revenue side of the Exchequer were expressly created by that word; in which, indeed, the terms "appeal" and "appealing" meet the eye all through the Act, in its actual provisions. If the delegated power be given to the Exchequer, how remarkable it is that Parliament, having expressly created rights of appeal where such was the intention, should suddenly have altered its language, and used ambiguous terms, with the intention, not only to delegate like powers to the Barons of the Exchequer, but powers actually enabling them to create the very rights which Parliament itself had rejected. Parliament said, that the litigating parties, except in certain cases otherwise provided for, should proceed by bill of exceptions. The Barons of the Court of Exchequer say, "You shall have, in addition to those rights, others which Parliament have withheld from you."

My Lords, these views would lead us to examine with much care the delegated powers given to the Court of Exchequer, and I must therefore once more trouble your Lordships with reading section 26, before I proceed to a minute examination of those powers. [His Lordship read its first part; see *ante*, 709.] And section 27 empowers the Court of Exchequer to issue new forms of writs and proceedings.

Now, section 26, although consisting of two parts, forms only one law, having the same object. The first portion authorises the Barons generally, from time to time, from any source, to make such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court of Exchequer, &c. and for the effectual execution of the Act, and the intention and objects thereof, as may seem to them necessary and proper. Now, to stop here for a moment; it is admitted by the learned

\* Attorney-General, that under this authority the Barons of \*750 the Exchequer could not have supplied the bill of exceptions if section 20 had not been granted it. And it could not have been supplied by the second part of the clause which I am about to read, because no such provision is in the Common Law Procedure Act. And further, it was admitted that under this authority the appeal clauses in question could not have been created.

But to proceed, the second portion of section 26 adds — [His Lordship read it; see *ante*, 709.]

It appears to me clearly, that the whole of this second portion

of the section is governed by the concluding words. The first portion speaks generally of the process, practice, and mode of pleading; whereas, although the second portion first authorises generally the application of any of the provisions of the Common Law Procedure Act, it proceeds to say, "and any of the rules of pleading and practice" (omitting "process") "on the plea side of the Court," and then winds up, as we have seen, by declaring the object to be to make the process (here that word is introduced), practice, and mode of pleading as nearly as may be uniform on both sides of the Court. So that the first part of the second portion of the section would extend to process, and the latter part to practice and pleading; and in that way the concluding words clearly control, direct, and explain the whole of section 26.

It seems difficult to admit that these powers would not have enabled the Barons to create a right to a bill of exceptions on the revenue side, and at the same time to hold that the right to a bill of exceptions, actually created by the statute, could, under the power in section 26, have attached to it (or indeed in substitution for it) other and easier modes of appeal to the higher  
 \*751 Courts. It would be \*found difficult to give a different construction to the words "process, practice, and mode of pleading" in the first and in the second portions of section 26. I must say that, after all which I have heard, and after the great attention which I have paid to this case, I am quite unable to understand the ground upon which it was possible to maintain a solid argument, that in the one part of the section the words are to be read in one sense, and in another part they are to be read in a different and in an opposite sense.

The section itself is so framed as to exclude the construction contended for. The words, "from time to time," carefully repeated, seem to point at such powers as could not only from time to time be granted, but could also be repealed or altered; in short, confined to process, practice, and pleading, in the ordinary sense of those terms. No doubt the Barons of the Exchequer could deal with existing appeals under the Act, but they could not create any new right of appeal.

It is remarkable that section 26 gives this legislative power, as claimed, to the Lord Chief Baron and two or more Barons of the Exchequer; so that the concurrence of all the Barons was not

required. And yet in the next section, which is for mere matter of form, the authority is confined to the Lord Chief Baron and the Barons. Parliament does not seem to have attached much importance to the delegated power. If it was the intention of Parliament, divesting itself of a power which it ought never to part with, to delegate to any other person out of Parliament legislative power, power to enact new laws, and create new rights of appeal, thereby conferring the greatest power which Parliament could confer upon a Court,—if, I say, such could have been the grave intention of Parliament, stripping itself, \* as it ought not to have \*752 done for any reason, of a power which it declined to exercise itself, and which it never intended to exercise, would it have left to a mere majority of the Court of Exchequer that great power? Whereas, when it came to a question of form immediately succeeding the special great power, it required all the Court to concur. Where is the construction which possibly could lead your Lordships to take such a view of such a clause as that which we are now considering?

I cannot think the saving clause at the end of the Act unimportant; it declares that nothing in the Act contained shall affect or prejudice the jurisdiction or authority of the Court of Exchequer, &c. Now, the making of orders giving a right of appeal from the Court of Exchequer, where such right of appeal did not before exist, is an act by the present Barons of the Court of Exchequer, which does, if valid, affect and prejudice the jurisdiction and authority of the Court in all time to come. The present Barons exercising this power have superadded what did not before exist, namely, a right of appeal in various modes from the decision of the Court of Exchequer. The Court of Exchequer having a right to decide without any power of appeal, the present Barons of the Exchequer have, in the exercise of the authority which they claim, made their judgments subject to the decision of a higher tribunal. If that is not affecting the jurisdiction of the Court, I cannot imagine what can be said to be so.

My Lords, I have by anticipation shown that my opinion is, that the words “process, practice, and pleading” cannot bear the construction put upon them by the Attorney-General; I think that they must be received in their common acceptance. Several of the sections in \* the Act of 1859 appear to me to show \*753 that Parliament used the terms in that restricted sense.

I will ask your Lordships to observe that section 22, and those clauses which I am now referring to, are not printed in the joint Appendix ; they do not appear to have struck anybody in the way in which they strike me at present. Section 22 makes good defects in pleading on the revenue side of the Court of Exchequer. Section 23 relates to process for levying of fines, &c. Section 24 directs execution to issue to recover certain debts according to the rules and practice of the Court ; and those terms are all repeated in section 26, which is separated from the others only by one clause creating a new right in the Crown. It is remarkable, therefore, that in the very Act which contains section 26, which speaks of "process, practice, and pleading," in three of the sections immediately preceding the 26th, one gives you an instance and a rule in regard to pleading, another gives you an instance and a rule in regard to process, and the third gives you an instance and a rule in regard to practice. Well, then, as Parliament had just spoken of "process, practice, and pleading," and shown their proper application to the proper cases, in every instance using the very terms, not vaguely, not by inference, not by implication, but in the very words that we are now considering — speaking of process, speaking of pleading, speaking of practice, every one of those terms used, and every one of them applied distinctly and directly to its own proper object and its own proper work — is not that a guide to section 26 ? When the Act, therefore, speaks of the process, practice, and pleading of the Court, we have only to cast our eyes a few inches above, and to look at the rules, and the Act there tells us what Parliament intended by those expressions. It appears to me, I confess \* with very great submission, that, although no doubt the observation has not been hitherto made, it would be very difficult to answer that view of the case.

The fact that no such extended irresponsible power was ever before given by Parliament to any Judges is entitled to much weight when we are asked to construe words into an authority to create an appeal to the Exchequer Chamber and to this House, although no such intention is expressed, and although the words which are used may well be satisfied by applying them to other and minor, yet important, objects. The more it is attempted to show that the Barons of the Exchequer have an absolute power to create new rights of appeal on the revenue side of the Court, the more I am

impressed with the objection that, looking through the four corners of the Act of Parliament, not only is no such intention expressed, but the whole frame of the Act rebuts a construction which would not be subsidiary to the Act, but would run counter to its express and careful provisions.

My clear opinion, therefore, is that the orders were void, and that the appeal should be dismissed, with costs.

**LORD WENSLEYDALE.** — The question which your Lordships have now to decide is very important. I regret to find that the conclusion to which some of my noble and learned friends have arrived differs from mine; and from the sincere respect I have for their opinion, I cannot, of course, feel great confidence in my own. But after having given every consideration in my power to the question, I feel bound to advise your Lordships to adopt the course which I think is just, and to reverse the decision of the Court of Exchequer Chamber.

The question, though important, really lies in the narrowest compass, and is only as to the meaning of the 26th section of the Statute 21 & 22 Vict. c. 21, “an Act to regulate the office of Queen’s Remembrancer.” This section makes it lawful — [His Lordship read it.]

To this section we must, I am clearly of opinion, apply the ordinary rule of construction applicable to all written instruments. What is the true meaning of the words used according to their usual acceptation and their ordinary grammatical meaning? And applying that rule, I do not think there is much doubt what the meaning is. Does it authorise the Court of Exchequer to grant an appeal to the Court of Exchequer Chamber and the House of Lords against the decision of the Court of Exchequer on the revenue side on a rule for a new trial on the ground of misdirection?

On perusing the very able opinions of some of the Judges of the Court of Queen’s Bench, delivered in the Exchequer Chamber, I perceive in them a suggestion of a rule of law that such power of appeal was so unusual that it required “a clear, unambiguous expression” of the intention of the Legislature in order to support it; that the power must be “distinctly and unequivocally given”; and that supposed rule seems to me to have had great influence in forming the opinions of these Judges of the Court of Queen’s Bench.

Such a rule of construction appeared to me to be entirely new, as far as my experience went, and I inquired from the learned counsel in the course of the argument, whether any authority could be found for such a principle of construction. I was referred by Mr. Mellish to some cases on the subject of appeals from the decisions of magistrates, collected in Dickinson's Session's Cases, 6th ed. p. 626. These, when closely examined, appear to

amount to no more than this, that an appeal cannot be  
 \* 756 \* given "by implication," which is, in truth, no more than this, that however much you may be satisfied that the Legislature must have intended to give it, it is not enough unless there are words to give it.

I have often had occasion to mention, on the construction of written instruments, how important it was in every question of intention to distinguish between the meaning of the words used, and what the framer of them may be supposed to have intended, and I have found that the real distinction has not always been attended to; yet it is important. In my opinion there is no legal ground for such a principle of construction as seems to have been acted upon by some of the Judges.

The true question for us to decide is, what is the ordinary and grammatical meaning of the words used in this section. Do these words give the Chief Baron and two Barons the power of extending the right of appealing against the decision of a rule to show cause for a new trial, on the ground of misdirection, to the Court of Exchequer Chamber, such a power being clearly given to the common law Courts by the Act of 1854.

The first part of the 26th section gives the Judges power to make new rules and orders on the revenue side of the Court. It is not contended that this would authorise a new rule to allow an appeal. The words of the second part, if taken by themselves, would clearly be enough to allow all the provisions of the Acts of 1852 and 1854 to be adopted on the revenue side of the Exchequer.

Three questions then arise: first, is this so unreasonable that the general power is not so to be construed? For, no doubt, if the natural and ordinary construction of the words used would lead to an absurd or unreasonable consequence, they may be moderated, or qualified, or explained.

\* 757 \* Secondly. Does the circumstance that other provis-

ions of the statute expressly enacting that certain clauses of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, should be in force, and should extend to the revenue side of the Exchequer, afford a proof that no others were intended to be so extended, applied, or adopted.

And, thirdly. Does the conclusion of the 26th section, explaining that the object of the enactment is that the process, practice, and mode of pleading of the revenue side of the Court of Exchequer should be made uniform with the process, practice, and mode of pleading on the plea side of the Court, make any difference? Is the word "practice" to be understood in the larger sense of the whole conduct of the procedure in the suit in the Court of Exchequer, from the beginning of the suit to the ultimate judgment and execution, or in the more limited sense of common and ordinary practice?

These several points must be disposed of.

First. It seems to me that it is impossible to say, that the introduction of a power of appeal against a decision upon a rule Nisi for a new trial for misdirection in point of law, is an unreasonable power; on the contrary, it is a most satisfactory one. It gets rid of the difficulties and inconveniences of a bill of exceptions, which all practitioners know to be extremely troublesome and embarrassing in its preparation and settlement, and substitutes a much more simple course for inquiry into the propriety of the Judge's ruling. I think it is wholly impossible to contend, with success, that the substitution of this mode of proceeding is not a very reasonable one.

Nor is there any thing in the least unreasonable, in delegating this power to the Judges of the Court itself. Mr. Justice Willes, in his very able judgment, has given \* many in- \*758 stances of such delegations by the Legislature to others. The Act of 3 & 4 Wm. 4, c. 42, the first of a series of Acts by which the law has been greatly reformed and improved, gives to the Judges the whole authority to make most important changes, subject only to the condition of being laid before Parliament. The Common Law Procedure Act, 1852, gives a somewhat similar power to the Judges. So the Common Law Procedure Act, 1854. These powers were given to a quorum of eight Judges, the chiefs of the Court being three. In this case it is the chief of the Exchequer and two Judges, who have the power delegated to them;



but the delegation being perfectly reasonable, there surely is not the shadow of an objection that a quorum of the Judges of the Court, who alone administer the law of the Exchequer, should have the power to make the allowed alterations in it. I think, therefore, that the power of adopting the provisions as to appeal, is quite valid.

Secondly. Does the enactment in express terms in the Statute 22 & 23 Vict. c. 21, of certain provisions as applicable to the revenue side of the Court of Exchequer, afford an inference that they were all that the Legislature meant to be so applied, and operate as a sort of legislative declaration that no more should be so applied? I think this circumstance affords no such inference. Clearly not as to those which are independent of the power to appeal, or to bring a writ of error. All that can be implied is, that those powers were all that the Legislature itself then thought expedient; but it gives to the Judges the power of adding from time to time, others which they might judge proper, if circumstances should render it advisable. It is confided to them to exercise that discretion fairly and properly. Had the Legislature thought it right to allow no other provisions to be applied, nothing  
\*759 \* would have been more easy than to have said so. We cannot imply that restriction without its being uttered.

These sections are the 9th, 10th, 12th, 15th, and 20th. The 9th refers to the power of amendment only, and is given to its full extent. It is of the most frequent application, and nothing is more reasonable than that the Legislature should, at all events, have enacted that this useful provision should be made.

Mr. Justice Willes has assigned most satisfactory reasons why the new sections giving error or appeal, were necessarily inserted. It is from those only that any inference can be drawn that the powers of error and appeal were to go no further. The 12th section giving appeal from the assessment of the Commissioners of Inland Revenue, was absolutely necessary, because the Common Law Procedure Acts, 1852 and 1854, had not given it. So the 15th section, giving error on a writ of summons on the Succession Duty Act, or for legacy duties. So the 20th. For a bill of exceptions in a common case was not given by the statute of 1852, but only in the newly constituted multifarious case of ejectment. It had previously been given by the Statute of Westminster 2, in other cases.

As to the section 10 there is great doubt also, to say the least, whether it was not necessary, for it does not give precisely the same power to state a case as the 42d and 46th sections of the statute of 1852, the first of which gave only a qualified power to the Judge on being satisfied that the parties have a *bona fide* interest in the question, which is not required in the section 10. It would not have been sufficient, therefore, to leave those 42d and 46th sections unaltered, and section 10 effected that object. As the Attorney-General in all revenue cases is a necessary party, he is included in the term "parties," \* as pointed out \* 760 by Mr. Justice Willes's judgment, and his consent to a case would supersede the judgment of a Judge as to the *bona fide* interests in the question. This, in my mind, is quite satisfactory. But even if it leaves it a matter of doubt whether this power could have been given by the Acts of 1852 and 1854, it was expedient to make it perfectly clear, and to leave no question as to the right of the Attorney-General on behalf of the Crown to the claim to have such a case stated, with the consent of the other party to the cause, and the simple order of the Judge.

On the whole, it seems to me clear that the principle of *expressio unius est exclusio alterius* cannot be held to apply. I have come, therefore, after much consideration, to the conclusion that the second part of the 26th section authorises the Exchequer Judges to make a regulation giving an appeal in the case of a discharge of a rule Nisi for a new trial.

The third question is, whether this power is qualified so as to confine it entirely to matter of the ordinary practice of the Court in a limited sense.

The words of the second part of the section go much beyond that. They authorise the Chief Baron and Barons from time to time, by any rule or order, to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854. This is quite independent of the clause authorising the application of the rules of pleading and practice; but the general object is to make the process, practice, and mode of pleading on the revenue side of the Court, as nearly as may be, uniform with the process, practice, and mode of pleading on the plea side of the Court.

Does that provision limit and control the power to adopt the provisions of the Acts 1852 and 1854, and apply to \* com- \* 761

mon and ordinary practice in the limited sense only? Many of those provisions in the two Acts go greatly beyond "practice" in that sense, and process and pleading also. Can it be supposed that the Legislature meant to undo, by the use of that term in the concluding part, what it had given before?

I cannot but think that to make the whole clause consistent, the word "practice" must be construed in the larger sense given to it in the judgment of the Judges of the Court of Common Pleas, and explained more particularly by Mr. Justice Willes. It seems to be used in the same sense as it is in the preamble of the statute of 1852 (which is of much more importance than the title), and in the preamble of this Act 22 & 23 Vict. c. 21. It is for rendering the process, practice, and mode of pleading in the superior Courts more simple and speedy; and one purpose, *inter alia*, is to make provision in relation to the procedure on the revenue side of the Court.

Nor can I see any ground to confine the enactments to one department of the revenue side of the Court, as contended by Mr. Mellish. The words apply equally to all pleadings and proceedings on the revenue side of the Court.

The abolition of the writ of error on the revenue side by section 19 (giving the Barons a discretion as to bail, which would not therefore necessarily affect the Attorney-General), and by the Act of 1852, § 148, which enacts that a writ of error shall not be necessary or used in the proceeding to error, but shall be a step in the cause, seems to me to put the Court from which the record was before removed by the writ of the Queen, entirely on a different footing. The suit is now begun and ended in the same Court.

The cause is not removed. The execution issues from it, \*762 the Court of Error giving its assistance to come to \* a right final conclusion. I agree with the Judges who think that the whole proceeding, from the beginning to the end of the suit, the taking the opinion of the Court of Error as well as acting upon it, constitutes the practice of the Court since the recent alteration, and a different mode of taking that opinion makes that a part of the procedure.

But a question has been presented to our attention at the close of Sir Hugh Cairns's argument, and since fully discussed, which must be now considered: Was it competent for the Judges of the Exchequer to alter the law as to then pending proceedings, and to

enact provisions at the time, which they did, viz. on the 4th November, 1863, so as to affect the verdict, which the claimant then had, which was subject only to the then existing law, and make it subject to another mode of inquiry?

I was much impressed with this objection at first, and was for a time strongly inclined to think that it was well founded, and that the new rules, though operative as to all future suits, were not operative in this. But further argument, and a full consideration of this question, have satisfied me that this objection is not well founded.

Two questions present themselves: 1st. What would have been the effect if the Legislature had made a new Act of Parliament, containing precisely the same terms as the rules of the 4th November? Would it have affected existing suits? 2d. If it would, ought the rules to be construed in a different way, and not allowed to have that effect?

I answer, that the new law would affect the existing suit, and the delegated authority to the Barons of the Exchequer ought to have precisely the same effect.

First, in this case it is perfectly clear, that what I for the present may call the law of the 4th November, 1863, took away no right. The verdict had been given for the \*claimant. The \*763 power of tendering a bill of exceptions was gone. The new law took away no right from the claimant; it gave both the claimant and the Crown precisely the same right, that of questioning the propriety of the decisions of the Court of Exchequer on a rule for a new trial for misdirection. If the judgment was given for the claimant, the Crown has the right to question that by appeal. If for the Crown, the claimant has exactly the same right. The new law is therefore perfectly fair to both parties.

But, independently of that consideration, I think that if it were an alteration in the mode of proceeding only, to the prejudice of the claimants, the objection would not prevail.

There is no doubt of the justice of the rule laid down by Lord Coke,<sup>1</sup> that enactments in a statute are generally to be construed to be prospective, and to regulate the future conduct of parties. But this rule of construction would yield to the intention of the Legislature. It could not be supposed that the Legislature meant

<sup>1</sup> 2 Inst. 292.

to deprive a man of a vested right of action. This was laid down in *Moon v. Durden*.<sup>1</sup>

But on the other hand, it is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away; and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter. This has been most clearly and satisfactorily explained in the case of *Wright v. Hale*,<sup>2</sup> particularly by Sir James Wilde. In that case it was held that the Common Law Procedure Act, 1860, Section 34,

\*764 \* which enacts that if a plaintiff in an action for a wrong, in the superior Courts, recovers less than 5*l.*, he shall not be entitled to costs, unless the Judge certifies that the action was brought to try a right, applies to actions tried after though commenced before the suit. Sir James Wilde says, with truth, that this does not take away any right.

The right of the suitor is to bring the action, and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure.

I am, therefore, clearly of opinion, that if the provisions of the rule had been in an Act of Parliament of the same date, the Act would have affected existing suits, and would unquestionably have given an appeal in suits in which verdicts were already obtained.

Secondly, are these rules made, not directly by Parliament, but by delegated authority, to be differently construed? I think they are not. Parliament has delegated the power without restriction to the Judges. It has made no conditions that it should operate only as to future suits; and if it was not to affect pending suits, many useful alterations might have been prevented. The period of making the allowed rules is left entirely to the Judges themselves to decide. It must be considered as unquestionable that they had a power to make rules for existing suits; and if they make

<sup>1</sup> 2 Exch. 22.

<sup>2</sup> 6 H. & N. 227.

great changes, even if they were \* to be thought unreasonable, \* 765 they would not therefore be void, because the discretion of the Judges is absolute, and their rules final. But, in truth, they operated with perfect fairness on both the litigant parties.

I forgot to say that the criticism on the language of the rules, made in the course of the argument, may be well founded. They are not accurately prepared, but their meaning is clear. There is a mistake in the provisions as to the "Court of Error," which is copied from the words of the Act. It referred to another Court of error; but the meaning is perfectly clear, and the inaccuracy cannot possibly lead to a mistake.

I am therefore of opinion, that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD CHELMSFORD. — My Lords, I cannot help feeling some regret that the learned Barons of the Court of Exchequer did not hesitate a little before they determined to relieve the Crown from the difficulty in which it was placed with respect to a bill of exceptions, by issuing the rule in question, because from the haste in which it was necessarily prepared in order to render it available for its intended object, scarcely any time could have been afforded them to consider the grave doubts which have subsequently arisen, and which, upon reflection, might have occurred to themselves, as to their power to meet the emergency in the mode which they adopted. They might also, upon consideration, have felt that, however justifiable the occasion might seem, it was not desirable, under any circumstances, to make a rule which, though in terms calculated for general application, was purposely designed to answer the exigency of a particular case.

To this rule, so introduced, an objection has been taken \* at your Lordships' bar, on account of its supposed retro- \* 766 spective operation. This objection does not appear to have been raised in the Court of Error, though incidentally mentioned in the course of the argument there. Whatever conclusion may be adopted as to its operation and effect, I am so strongly of opinion it was *ultra vires* of the framers of it, that I think it unnecessary to make any observations upon its alleged invalidity on any other ground.

The short question is, whether the Legislature, by the 26th section of the Queen's Remembrancer's Act (22 & 23 Vict. c. 21),

has given to a majority of the Barons of the Court of Exchequer the power to determine whether it is expedient that there should be a right of appeal in a case in which none existed before ?

There is, to my mind, a sort of *prima facie* presumption against this having been intended, arising from the consideration that if the Legislature meant to delegate its power in this respect, a very few plain and simple words would have been sufficient to express the intention ; but so far from clearly conveying the meaning, it is so concealed under the language employed, that the ingenuity of the ablest counsel has been tasked to discover it, and after arguments of great length, both in this House and in the Exchequer Chamber, it is still left in the doubt and uncertainty which must necessarily result from the difference of opinion which it has produced. Clear and distinct language might have been expected upon an occasion where the Legislature, having ample means of forming a competent judgment on the expediency of allowing an appeal in a particular case, was about to remit to the Judges of a Court the discretion of determining whether such an appeal from their own decision ought or ought not to be granted. I

\* 767 quite agree with my noble \* and learned friend (Lord Wensleydale) that it is not necessary that the power should have been "distinctly and unequivocally given" ; but neither ought it to have been left to a doubtful and conjectural inference from equivocal words.

The whole argument is involved in the construction of the latter part of the 26th section of the Queen's Remembrancer's Act, "and also from time to time," &c. The section has been read so often, that I will not trouble the House with it. The words to be principally dwelt upon are "process, practice, and mode of pleading." Now these words "process" and "pleading" are, by common consent, dismissed as wholly inappropriate to describe any proceeding which is to be carried on beyond the walls of the Court, and the whole stress of the argument is laid upon the word "practice." But as this word "practice" (more especially looking to the company in which it is found) would, in its ordinary meaning, be confined like the other two words to the Court itself, it has been necessary to pray in aid of the more extensive meaning contended for, the words of the Common Law Procedure Act, 1852, section 148, repeated in the Queen's Remembrancer's Act, section 19, that "the proceeding to error shall be a step in the cause."

The argument then proceeds thus: writs of error being abolished and appeals substituted in every case in which error can be brought, the proceedings to the Court of Appeal are proceedings in the Court below, and become part of the practice of the Court. Therefore, a statute empowering the Judges of one Court, from which no appeal lies, to assimilate its practice to another from which a right of appeal exists, necessarily and expressly confers the power to create such an appeal, or the practice of the two Courts would not be uniform.

\* But this argument appears to be without foundation in \*768 the language of the Legislature on which it is rested. It is to be observed that the words used are not "the proceeding in error shall be a step in the cause," but "the proceeding to error." It would certainly be an extraordinary provision to enact that the proceedings in one Court shall be part of the practice of another; but not at all to say that every step up to the very door of the Court of Error shall be a proceeding in the Court from which the error proceeds.

The word "practice," however, is said to be a word of wide extent. Mr. Justice Willes says it applies to "all the proceedings by which a cause is brought to judgment and execution. And Chief Justice Erle says, "Throughout the Common Law Procedure Act, and the Queen's Remembrancer's Act, 'procedure' is used as equivalent to process, practice, and mode of pleading." But the word "procedure" is nowhere used in any of the enactments of the Common Law Procedure Act, or of the Queen's Remembrancer's Act. It is merely part of the name by which the first mentioned Act is to be cited, and a portion of the title of the latter Act. The learned Chief Justice's meaning must, therefore, be that the word "procedure" is used by the Legislature as the description of an Act which comprehends provisions as to process, practice, and pleading; a remark which, with great deference, appears to me to have no force at all in the argument. Mr. Justice Willes also is not quite accurate in saying that the word "practice" is a word applying "to all the proceedings by which a cause is brought to judgment and execution." In its ordinary meaning, it is undoubtedly distinguished from the "pleadings"; no unimportant part of the proceedings by which a cause is brought to judgment. The learned \* Judge also, placing no reliance \*769 upon the word "process," and, of course, not on the word



"pleading," says, "but coming to 'practice,' 'practice' is no term of Act." Here again I must beg leave to differ with him. "Practice," even standing by itself, applies to a part of the proceedings of a Court, which are sufficiently distinguishable from the rest to be the subject of books of practice. As to his observation, that one of the heads of such a work will be the head of "error," that is likely to be the case, because Courts of error have their practice as well as Courts of original jurisdiction. A book of practice, therefore, without such a heading, might be regarded as imperfect or incomplete, but it would hardly be called "maimed" (in the view of the learned Judge), because nothing would be cut off from the history of the practice of the other Courts, of which alone, upon this supposition, it would profess to treat.

It may be that the word "practice," under certain circumstances, may be as comprehensive in its expression as the argument requires; but it hardly seems a correct mode of ascertaining its meaning in the place where it is found to separate it from all the other words with which it is associated, and, having thus detached it from its qualifying context, to construe it by itself. Even if the term "practice" might, in a popular sense, be taken to comprehend all the proceedings in a suit from the beginning to the end, yet when the Legislature uses it with the words "process and pleading," it must have a limited meaning assigned to it. And as the practice of a Court is as much distinguished from its process and pleading as these portions of the proceedings are from each other, the word "practice" in such a connection cannot be supposed to have been intended (in the words of Chief Justice \*770 Erle) "to include the whole of the suit from the \* issuing of the first to the execution of the last process. But attributing the most comprehensive meaning to the word "practice," it is still the practice of the Court of Exchequer to which the statute refers; it is a proceeding in that Court which is to bring the parties to the door of the Court of Error. The practice pointed at does not advance a single step over the threshold of the Court of Appeal. It is applicable to all cases in which a right of appeal previously existed, but has no force whatever to create a new right. To give it that effect would be to confound the distinction (in the words of Mr. Justice Crompton) between "the machinery of the appeal and the right of appeal."

The view which I have taken of the limited extent of the word

"practice," in the 26th section of the Queen's Remembrancer's Act, appears to me to receive strong confirmation from other parts of the Act. In several other sections appeals from the revenue side of the Court of Exchequer are specially provided for; and it may fairly be asked why, if the Legislature intended that there should be an appeal in cases of motions for a new trial, a provision to this effect was not expressly made? It is generally considered to be a sufficient indication of intention, when certain things are specifically enumerated, that others, not mentioned, are not proposed to be included.

Plausible reasons have been suggested why it was necessary that the Act should contain provisions for appeals on special cases, bills of exception, and cases of succession, and of legacy duty. Yet no satisfactory explanation has been given why the Legislature should have taken all these under its own direction, and, as if proclaiming its incompetency to decide upon a question of expediency, should have left the only remaining case \* to be provided for by the delegated discretion of a majority of the Barons of Exchequer. \* 771

But even limiting the view to the section in question, the whole frame of it appears to me to militate against the construction which would extend the power of the Barons of the Exchequer to a proceeding beyond the precincts of their own Court. Besides the company in which the word "practice" is found, both clauses of the section provide for the exercise from time to time of the powers which it confers.

It has been argued, and perhaps correctly, that if the Barons possessed the power of giving an appeal, and executed it, it could not be recalled. But this appears to me to prove that the Act would not apply to such an irrevocable power, but was intended to be confined to the adoption of such provisions of the Common Law Procedure Acts with respect to process, practice, and pleading, as might properly be subject to alteration "from time to time," according to the result of experience.

It was argued, that unless the power to extend, apply or adapt any of the provisions of the Common Law Procedure Acts applies (amongst others) to the clauses giving the rights of appeal in motions for new trial, the power given by the two clauses would be coextensive, and the latter would be merely a repetition of the former. But it appears to me that the two portions of this section

may be distinguished from each other, and that each may have its due effect ; alterations in the proceedings on the revenue side of the Court of Exchequer having been introduced by the Act, some rules would be absolutely required to meet this new state of things. Accordingly, the former part of the section directs the

Barons to make such rules as might seem to them necessary and proper. \* But beyond these rules, which were indispensable, the Legislature, considering that some of the provisions of the Common Law Procedure Acts, and the rules of pleading already made for the regulation of the pleading and practice on the plea side of the Court, might possibly be usefully applied to the revenue side ; but not having itself the practical experience necessary to enable it to make a selection of them, therefore, by the latter part of the section, it left to the discretion of the Judges to determine which of these provisions and rules (if any) it might be expedient to adopt in order to produce uniformity in the proceedings on both sides of the Court.

My noble and learned friend (Lord Wensleydale) says, that the words of the latter part of the section, authorising the Barons to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts, are quite independent of the clause authorising the application of the rules of pleading and practice. But with great respect I would observe, that in this portion of the section the sense is carried on from the words " and also " continuously to the end, that the whole of it must therefore be taken together in construction, and then it will appear that it is not to any of the provisions of the Common Law Procedure Acts absolutely that the power applies, but only to such as may seem expedient for making the process, practice, and mode of pleading on the revenue side of the Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court.

We are thus brought back again to the point upon which the whole controversy turns, namely, the meaning of the word " practice," as it stands in the Act. I have already endeavoured to show that it cannot possibly apply to any proceedings beyond the Court itself ; and \* that therefore those sections of the Common Law Procedure Acts which relate to appeals are not within the range of the discretionary authority intended to be conferred by the Legislature.

I have arrived at this conclusion with great reluctance. It is

very much to be regretted that the Crown should have been deprived of the means of appealing from the decision of the Court of Exchequer upon a question of national importance. I should have been glad to find some reason for supporting the validity of the rule issued by the Barons, but I can discover none. I must therefore act upon the clear conviction of my own judgment, and pronounce my decided opinion in favour of the respondents.

LORD KINGSDOWN. — My Lords, the argument on the first question in this case as to the power of the Court of Exchequer to make the orders in question, has been so entirely exhausted that it would be improper for me to go into it at any length. The reasons assigned by the majority of the Judges in the Exchequer Chamber appear to me to preponderate, and the grounds on which my judgment rests are laid down, more clearly than I could state them, in the opinion of the Lord Chief Justice Cockburn.

Previously to the Queen's Remembrancer's Act there were, as I understand, no means of reviewing a decision of the Court of Exchequer on the revenue side, except by writ of error. Under the two Acts of Common Law Procedure of 1852 and 1854, there were on the plea side more simple proceedings on error than by writ of error, and also the several other remedies introduced by the Act of 1854. There was, further, the proceeding by bill of exceptions, independently of those Acts.

\* If all the proceedings in error and appeal applicable to \* 774 the plea side of the Court were considered applicable to the revenue side, there seems no reason why, by the Act of 1854, they should not have been extended to both sides. The same observation applies to the Act of 1859. Why, if they were thought by the Legislature to be all applicable, were they not all applied? But instead of taking that course, the Legislature makes a careful selection of some clauses, and omits others. With reference to the particular matter now in question, it omits the appeal from the decision on a motion for a new trial, and gives, as I think, in substitution for it, the proceeding by bill of exceptions.

It has been said that the same relief may be had by both those modes of proceeding, but that there are many difficulties in the latter which are not found in the former. If this be so, the Crown may have been willing to give the right of review, subject to the restrictions which those difficulties might impose, but no further ;

but that, contemplating the application of both remedies, the Legislature should itself give the one, and the less convenient, and leave it to the Court of Exchequer, at its discretion, to give or withhold the other, and the more convenient, is to me quite inconceivable. It may have used words so large as to compel us to say that this power is given; but if the clause be capable of two constructions, I think that should be adopted which is most consistent with the probable intention to be collected from the other clauses.

When the words of the 26th section are examined, it seems to me that they neither require nor warrant the larger construction. The section is introduced for the purpose of enabling and directing the Court of Exchequer to make rules and orders for regulating its process, \* practice, and mode of pleading, with a view to the alterations introduced by the Act, and to making such process, practice, and mode of pleading as nearly as may be uniform on the two sides of the Court. For this purpose, and, as I understand it, for this purpose only, the Barons may extend, apply, and adapt any of the provisions of the two Acts of 1852 and 1854.

Read in their ordinary meaning, as applied to proceedings within the Court itself, the words are reasonable, consistent with the other provisions of the Act, and in accordance with what is found in the two Acts referred to. They are consistent also with the provision that the rules may be made from time to time, and with the fact that the same words which apply to the provisions of the two Acts, are applied also, in the expressions immediately following, to the rules of pleading and practice on the plea side of the Court. I am by no means satisfied that there is any redundancy in the language of the section thus construed; but if there be, it is not in my opinion sufficient to outweigh the objections to the other construction.

What the Court of Exchequer has attempted by its orders to do is to give to two superior Courts, the Exchequer Chamber and the House of Lords, jurisdiction to hear, and to impose upon them the duty of hearing, an appeal against its decisions, with which, except for those orders, those Courts would have neither the duty nor the right to interfere. Can it possibly be said that this is to regulate the practice of the Court of Exchequer? All the proceeding which leads to the other Courts when those other Courts are open,

all the proceeding to error, is a step in the cause, and part of the practice of the Court; but whether the doors of the other Courts are to be open \* or not, surely is not a point of \*776 practice in the Inferior Court.

It is said that the Legislature has already given the appeal by means of a bill of exceptions, and what is now proposed to be done is only to do the same thing in a more convenient form.

But the answer to this seems to me to be that the Legislature has given no general power to the superior Courts to review the decisions of the Court of Exchequer. It has prescribed certain special modes of proceeding by which this may be done, and has by necessary implication excluded others.

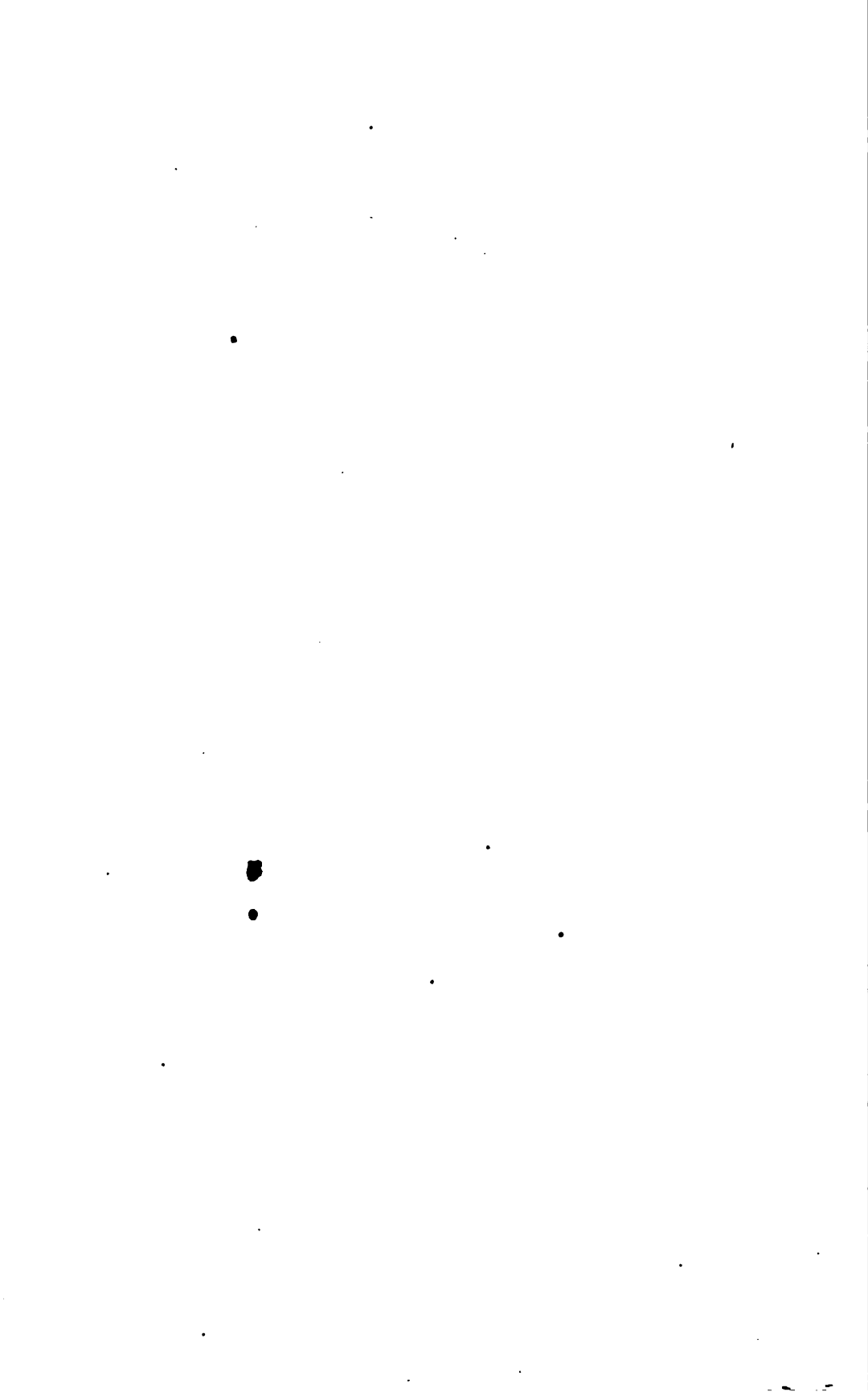
The law before the orders said, the decision of the Court of Exchequer on a motion for a new trial shall be final. The orders say it shall not be final. It is not a new mode of effecting an object which could already be attained in a different mode. There was no mode whatever then subsisting by which the decision now complained of could have been disturbed. There was a mode by which the necessity of moving for a new trial might have been prevented, but that is quite a different thing, and it is not because that mode has failed (no matter from what cause) that the Court of Exchequer can create a new jurisdiction, which the Legislature has not created, and in my opinion has not authorised the Court of Exchequer to create.

Having arrived at this conclusion on the first point, I think it unnecessary to say any thing on the second.

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*Judgment appealed from affirmed, and appeal dismissed, with Costs.*

Lords' Journals, 6th April, 1864.



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ADULTERY. See DIVORCE. QUEEN'S PROCTOR.

1. Adultery, alleged to have been committed by the petitioner at any time during the marriage, in which term is included the period between a decree for a divorce *a mensa et thoro*, and the actual dissolution of the marriage, is a countercharge into which the Court is so bound to inquire. — *Lautour v. The Queen's Proctor*, 685.

2. If such adultery has been committed between the time when a decree for a divorce *a mensa et thoro*, under the old law, was pronounced, and the time when a petition under the 20 & 21 Vict. c. 85, was presented, praying for a dissolution of the marriage, the Judge Ordinary, on being duly informed thereof, is "not bound" under the 31st section of the statute to dissolve the marriage. — *Id.*

APPEAL. See JURISDICTION. PATENT. PRACTICE, 5. SALE AND TRANSFER OF LANDS.

The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal, \* nor \* 778 both combined, can create such a right, it being essentially one of the limitation and of the extension of jurisdiction. — *The Attorney-General v. Sillem*, 704.

BANKRUPTCY. See CORPORATION.

BENEFICIARY. See PORTIONS.

\*BILL AND ANSWER. See EVIDENCE.

BREACH OF TRUST. See INTEREST ON MONEY. SOLICITOR.

BY-LAW. See CORPORATION.

CARRIERS. See RAILWAY.

CHANCERY. See CONSTRUCTION OF RULES. DOMICILE.

1. The Court of Chancery is not entitled to entertain an administration suit founded on a question relating to the construction of the will of a person



domiciled abroad, and the foreign executors might properly except to its jurisdiction. — *Enokin v. Wylie*, 1.

2. But parties thus entitled to insist on the authority of the Court of the domicile, may by their conduct give to the English Court authority and jurisdiction to construe the will, and administer the estate, so far as funds and persons in this country are concerned. — *Id.*

**CHANCERY, BILL AND ANSWER IN.** See EVIDENCE.  
**CLIVE FUND.**

In 1770 a deed was executed between Lord Clive and the directors, &c. of the East India Company by which Lord Clive transferred to the directors a sum of money to be employed in giving pensions to disabled officers and soldiers and their widows, his declared object being thereby to induce fit persons to enter the company's service, and to encourage them to bravery therein. The directors and their successors were to be perpetual trustees of the fund. In the deed was a covenant to the effect, that if after 1784 the company should cease to employ a military force in India, in the actual pay and service of the company, and ships for carrying on the company's trade, then the company would, subject to the annuities already payable out of the said fund, repay the money to Lord Clive or his representatives. In 1833, an Act of Parliament passed to put an end to the company's trading, and after April, 1834, ships were no longer employed by the company. In 1858 another Act transferred

- 779 \* the government of India from the company to the Crown, and likewise transferred the army of the company to the service of her Majesty. The same Act vested in her Majesty all the funds at the disposal of the company, and bound her Majesty by all the obligations of the company, fiduciary or otherwise : —

*Held*, reversing the decision of the Court below, that the covenant in the deed was a private covenant between Lord Clive and the company ; that the statutes in question did not affect this covenant ; that the objects of the original trust, namely, troops in the pay and service of the company, had ceased to exist ; that the covenant had thereupon come into operation, and therefore that the fund, subject to the charges already fixed upon it, had become payable to Lord Clive's representatives. — *Walsh v. The Secretary of State for India*, 367.

**COLLUSION.** See DIVORCE.

**COMPOSITION DEED.** See CORPORATION.

**COMPULSORY POWERS.** See DEED. RAILWAY.

**CONDITION.** See RAILWAY, 7.

**CONSTRUCTION, RULES OF.** See CHANCERY. MARRIAGE SETTLEMENT. PATENT. PROBATE. WILL.

When a contract is made in a foreign country, and in a foreign language, an English Court, having to construe it, must first obtain a translation of the instrument ; secondly, an explanation of the terms of art (if any) ; thirdly, evidence of the foreign law applicable to it ; and fourthly, evidence of any peculiar rules of construction which may exist in that law ; and must then itself interpret the instrument on ordinary principles of construction. — *Di Sora v. Philipps*, 624.

**CONTRACT.** See **MARRIAGE SETTLEMENT.** **MORTGAGE.** **RAILWAY, 2.**

1. In equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee. This rule applies to personal property, as well as to real estate. — *Holroyd v. Marshall*, 191.
2. Such a contract, if made with respect to the sale or mortgage of future acquired property, being capable of specific performance, \* trans- \* 780 fers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal. — *Id.*
3. Under a contract for the purchase of an estate where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and in equity transfers to him a corresponding portion of the estate. — *Rose v. Watson*, 672.

**CONVEYANCE.** See **DEED.** **MARRIAGE SETTLEMENT.****COPY OF A WILL.** See **EVIDENCE, 1.****CORPORATION.** See **FISHERY.**

1. A by-law of a corporate company declared that "no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the Court, unless it be proved that such person after his bankruptcy or insolvency has paid his debts, or shall have established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency":—

*Held*, that these words must be taken to mean not mere inability to pay debts in full, but inability proved by some outward act, a notorious or avowed insolvency, such as a public stoppage in business, or the calling together of his creditors, and obtaining time, or terms of indulgence, or entering into a deed of composition, so as to mark, as a distinct fact, a period of time from which the insolvency like the bankruptcy might be computed. — *The Queen v. The Saddlers' Company*, 404.

Per **LORD CRANWORTH.**— This interpretation alone could make the by-law good. — *Id.*

2. Where, therefore, a person, duly qualified as a freeman, was elected a member of the Court, being at that time in insolvent circumstances, and was admitted to office, and was afterwards declared a bankrupt, it was held that he did not come within the meaning of the by-law. — *Id.*
3. After election, but before being admitted, the person elected was asked by the clerk of the company (though it was not averred in the return, and did not appear in evidence, that the question was put by the authority of the Court) whether he was solvent, to which he answered that he was as solvent as any member of the Court, and could pay 20s. in the pound. This representation was false, and was afterwards made the ground of a resolution of the Court, passed without notice to him, to remove him from office:—

*Held*, that the insolvency here was not within the meaning of the by-law; that the false representation was not one which affected his eligibility,

and consequently that having been duly elected and admitted to the office, his removal without being heard in his defence was erroneous. — *Id.*

4. A person validly elected to an office and admitted to it, cannot be removed from it without notice. — *Id.*

5. The charter of the company gave the wardens and assistants thereof power to make such by-laws as, according to their sound discretion, should be for the good government of the general body.

Per LORD WENSLEYDALE. — Under this charter a by-law made by them would be valid, though it might have the effect of limiting the number of persons eligible to office by superinducing new qualifications, as to which the charter was silent.

Per LORD WENSLEYDALE. — In order to show a valid objection to the admittance, after election, the return should have stated an insolvency within the true meaning of the by-law. — *Id.*

**COSTS.** See MARRIAGE SETTLEMENT. RAILWAY. SALE AND TRANSFER OF LAND.

1. A Court of equity in deciding on a case relating to the construction of a doubtful Act of Parliament, held, that the case involved matter which might properly be made the subject of litigation, and so gave no costs. This House, though varying the order of the Court below, in one matter did not disturb it in that respect. — *Elliot v. Northeastern Railway Company*, 333.

2. Under peculiar circumstances, the House will order the costs of all the parties to come out of the general personal estate. — *Bective v. Hodgson*, 656.

3. The Queen's Proctor is only entitled to costs on intervening in a suit in the Divorce Court, when he does so on the ground of collusion, and establishes it. — *Lautour v. The Queen's Proctor*, 685.

**COVENANT.** See CLIVE FUND DEED.

**COUNTERCHARGE.** See DIVORCE.

**CROSS REMAINDERS.** See WILL, 10.

**DAMAGE.** See RAILWAY.

\*782 \*DEBT. See MORTGAGE, 2, 3.

**DEED.** See CONTRACT. MORTGAGE. MORTMAIN.

1. A deed of conveyance made under the authority of an Act of Parliament must be read as if the sections of the Act were incorporated in it. *Elliot v. Directors Northeastern Railway Company*, 333.

2. A conveyance granting land for a special purpose must be construed as conveying all the rights necessarily incident to the due execution of that purpose. — *Id.*

3. Whether the conveyance is a voluntary bargain between the parties, or is made because the Act gives the grantee the power of compelling a grant, these rules are applicable. — *Id.*

**DIVORCE.**

1. The 29th section of the 20 & 21 Vict. c. 85, imposes on the Court of the Judge Ordinary the obligation to inquire into any countercharge made against any person petitioning for a divorce. — *Lautour v. The Queen's Proctor*, 685.

2. Adultery alleged to have been committed by the petitioner at any time during the marriage, in which term is included the period between a decree for a divorce *a mensa et thoro*, and the actual time of the marriage, is a countercharge into which the Court is so bound to inquire. — *Id.*
3. If such adultery has been committed between the time when a decree for a divorce *a mensa et thoro*, under the old law, was pronounced, and the time when a petition under the 20 & 21 Vict. c. 85, was presented, praying for a dissolution of the marriage, the Judge Ordinary, on being duly informed thereof, is "not bound" under the 31st section of the statute to dissolve the marriage.  
*Quære*, whether he may, in his discretion, dissolve it? — *Id.*
4. The 23 & 24 Vict. c. 144, enables any one of the public to give to the Court of the Judge Ordinary, between the decree *Nisi* and the decree absolute for a divorce, information to relieve it from being misled on the subject of a divorce petition. That section gives to the Queen's Proctor the power to intervene in a case of collusion only, and, except in such a case, if he takes any proceedings in a suit for divorce, he appears only as one of the public giving information to the Court, and under such circumstances the Court has no power to award him costs. — *Id.*

## \* DOMICILE.

\* 783

1. The law of the domicile of a testator governs questions of testacy and intestacy, of the construction of the will, and of the rights of those who claim to be his next of kin. — *Enohin v. Wylie*, 1.
2. Where, therefore, a will was made by an Englishman, who died domiciled abroad, and the foreign Court had granted probate of the will, it became the duty of the English Court of Probate (some of his personal property being situated in this country), to grant ancillary probate to the foreign executors. It had no right to constitute itself a Court of construction. — *Id.*
3. The Court of Chancery, in like manner, was not entitled to entertain an administration suit founded on a question relating to the construction of the will, and the foreign executors might properly have excepted to its jurisdiction. — *Id.*
4. But parties thus entitled to insist on the authority of the Court of the domicile, may by their conduct give to the English Court authority and jurisdiction to construe the will and administer the estate, so far as funds and persons in this country are concerned. — *Id.*
5. A., a British subject, domiciled at St. Petersburg, made a will in the Russian form and Russian language, by which he expressed a desire "to dispose of all my moveable and immoveable property." After giving legacies, and directing his household property and estates in Russia to be sold, he went on, "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets" [a bank debenture peculiar to Russia] "belonging to me, shall be divided into ten equal parts"; two of which he devoted to debts and funeral expenses; and said, "of the remaining eight parts, I intend afterwards making a detailed disposal"; but if he did not (and he never did), they were to go to charitable purposes. He

then named executors, and concluded thus, "And as all my moveable and immoveable property is mine own, honestly acquired by myself, nobody has a right to interfere with my dispositions and contest the same, and no one has a right to interfere with or contest the dispositions and proceedings of my executors." The testator had large funds in the English consols: *Held*, that the executors did not take these consols under the general bequest in the will; and *Held* also, that as to these consols, there was an intestacy. — *Id.*

- \* 784 \* In order to lose a domicile of origin, and to acquire a new domicile, a man must intend *quatenus in illo exuere patriam*. It is not enough for him to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life. Change of residence alone, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. There must be an intention to change the domicile. — *Moorhouse v. Lord*, 272.

EAST INDIA COMPANY. See CLIVE FUND.

ELECTION. See CORPORATION.

EQUITY. See CHANCERY. CONTRACT. RELEASE.

ERROR. See JURISDICTION.

EVIDENCE. See FISHERY. PATENT. PRESUMPTION ON FACT. RAILWAY, 2.

1. The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors, is the only admissible evidence of the will. — *Enohin v. Wylie*, 1.
2. In an action against persons alleged to have trespassed on the several fishery of the plaintiff, there was a dispute as to the limits of the fishery. The plaintiff, the lessee of a corporation, tendered in evidence the bill and answer in chancery in a suit instituted a great many years before by another grantee of the Crown against the corporation, and in which the limits of the alleged fishery were described: —

*Held*, that as part of the history of the fishery and of the claims made to it, the bill and answer were admissible in evidence. — *Malcomson v. O'Dea*, 593.

3. The plaintiff also tendered in evidence an "Assembly Book," belonging to the corporation, dated in 1676, and containing entries of the rents due to the corporation from its various tenants, among which were entries of rents paid in respect of this fishery: —

*Held*, that the book was admissible as an ancient document showing the exercise of acts of ownership. — *Id.*

4. The plaintiff also tendered in evidence, for the purpose of showing the meaning of a particular phrase in the grants, a letter of license from the Crown, in 1676, to one of its grantees, to aliene the subject matter of the grant: —

*Held*, that the license was admissible for that purpose. — *Id.*

- \* 785 \* EXCHEQUER. See JURISDICTION.

EXECUTORS. See DOMICILE.

FISHERY. See EVIDENCE, 2, 3, 4.

1. The soil of navigable tidal rivers, so far as the tide flows and reflows, is

*prima facie* in the Crown, and the right of fishery therein is *prima facie* in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the Crown, and might, lawfully, have been exercised by the Crown before Magna Charta, and the several fishery could, lawfully, be afterwards made the subject of grant by the Crown to a private individual. — *Malcomson v. O'Dea*, 593.

2. Where a grant of a several fishery had been made by the Crown to a corporation, and rent received by the Crown in respect thereof for a long period of time, the earliest grants describing it as "an ancient inheritance of the Crown," it was held that the lawfulness of the origin of the several fishery might be presumed. — *Id.*

FOREIGN CONTRACT. See CONSTRUCTION, RULES OF.

FOREIGN LAW. See CONSTRUCTION, RULES OF. DOMICILE.

FRAUD. See INTEREST ON MONEY. MORTGAGE, 1, 3. SOLICITOR.

FUTURE PROPERTY, SALE OF. See MORTGAGE.

HEIR AT LAW. See PRACTICE, 3.

INCUMBERED ESTATES COURT. See SALE AND TRANSFER OF LANDS.

INSOLVENCY. See CORPORATION.

INTEREST ON MONEY. See MARRIAGE SETTLEMENT. PORTIONS. SOLICITOR.

1. T., a solicitor, had, by a sale to his clients of premises (which really belonged to him, but the knowledge of which fact he concealed from his clients), been guilty of a breach of trust in his character of solicitor. T., having made a large profit on the sale, was ordered to pay back the amount of this profit with the full amount of interest given in cases of a breach of trust, namely, five per cent. — *Tyrrell v. The Bank of London*, 26.

2. If the principal of a child's portion is not raiseable till the death of the survivor of father or mother, though the title to \* the portion \* 786 may be vested, interest on it will not be payable till that time, except on express words. — *Massy v. Lloyd*, 243.

Lord Cottenham's observations on this point (*Lord Milltown v. Trench*, 4 Clark & F. 307, 308) adopted. — *Id.*

INTERMEDIATE INCOME. See RESIDUE.

INTESTACY. See DOMICILE.

INTERVENE. See QUEEN'S PROCTOR.

IRELAND. See SALE AND TRANSFER OF LANDS IN.

JUDGE ORDINARY. See DIVORCE.

JURISDICTION. See DOMICILE.

1. The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal, nor both combined, can create such a right, it being essentially one of the limitation and of the extension of jurisdiction. — *The Attorney-General v. Sillem*, 704.
2. The words, "superior Courts of Common Law at Westminster" in the Common Law Procedure Acts, do not include the revenue side of the Exchequer. — *Id.*

3. In the 26th section of the Queen's Remembrancer's Act (22 & 23 Vict. c. 21), the words "process, practice, and mode of pleading" are not used in the abstract, but with reference to existing Courts; the word "practice" means the rules which guide the mode of proceeding within the walls of the Court itself; and the later words of the section give the Barons the power to "extend, apply, and adapt" to the revenue side of the Court of Exchequer no more than the "process, practice, and mode of pleading," which were already in use on the plea side of that Court, and these words bear in the second part of the section the same meaning as in the first part of the section. — *Id.*

*Held*, therefore, that rules, which, by applying to cases on the revenue side of the Exchequer, the provisions of the Common Law Procedure Act of 1854 respecting appeals on motions for a new trial, gave an appeal in such motions on the revenue side, were rules made without legislative authority, and were consequently void. (*Diss. Lord Cranworth and Lord Wensleydale*). — *Id.*

Per LORD CRANWORTH and LORD WENSLEYDALE. — The rules were  
 • 787 warranted by the 26th section of the 22 & 23 Vict. c. 21, \* for they only applied to proceedings on the revenue side of the Exchequer (as that section authorised), the practice then existing on the plea side where the right of appeal against a decision on a motion for a new trial had been already, by the 17 & 18 Vict. c. 125, established by the Legislature itself. — *The Attorney-General v. Sillem*, 704.

4. Per LORD WENSLEYDALE. — The second part of the 26th section of the 22 & 23 Vict. c. 21, taken by itself, would allow all the provisions of the Common Law Procedure Acts of 1852 and 1854 to be adapted to the revenue side of the Exchequer. — *Id.*

5. If the rules had been valid in themselves, it would not have been an objection to them that they affected suits then pending. — *Id.*

LEGACIES. See MARRIAGE SETTLEMENT.

LICENSE. See EVIDENCE. PAYMENT.

LIEN. See MORTGAGE, 6.

LIMITATION OF APPEAL. See SALE AND TRANSFER OF LANDS.

LIMITATION OR PURCHASE. See WILL.

MACHINERY. See MORTGAGE, 3.

MARRIAGE SETTLEMENT. See PORTIONS.

1. A., the younger of two sisters (the only children of their father), was about to be married. By a pre-nuptial contract executed abroad, where the marriage was to be celebrated, and the parties to it were domiciled, the father agreed to give A. a dowry of 40,000*l.*; of these, 20,000*l.* were to be paid within six months after the marriage; the remaining 20,000*l.*, divided into two sums of 10,000*l.* each, were made payable, one on a given event, the other on the father's death, with power reserved to him to pay the last-mentioned sum during his life. In the contract he declared his intention to give to A. an equal portion with her sister of what he should leave as residue, and used words which appeared to leave it doubtful whether this portion was to be ascertained before or after payment of debts and legacies. By his will he gave legacies to an amount which, with

the debts, entirely exhausted what would otherwise have been residue. The final sum of 10,000*l.* was not paid in his lifetime. After his death A. filed a bill against his representatives, to obtain payment of this sum, and also \* payment of the share of the residue, calculated on \* 788 its gross amount before payment of debts and legacies. The Court below held that on the proper construction of the contract this latter claim was unfounded; and, as to this claim, dismissed the bill with costs, but ordered payment of the 10,000*l.*, with interest to be calculated from the period of six months after the father's death: —

*Held*, that the order dismissing the bill with costs was right, for that the claim was founded on a misinterpretation made by the plaintiff, of the contract, and was not the consequence of any act of the testator, such as ought to make the costs come out of the estate. — *Di Sora v. Phillips*, 624.

But the decree was varied so far as related to the interest on the 10,000*l.*, which was ordered to be calculated from the date of the father's death. — *Id.*

#### MINERALS. See RAILWAY. MORTGAGE.

1. E. was the holder of a mortgage on lands given him by John S., who was largely his debtor. John S. afterwards mortgaged these lands to the directors of a banking company as security for existing debts and for some fresh advances. Before these advances were actually made the solicitor for the directors discovered that the lands had been previously mortgaged to E. The directors refused to complete the transaction with John S. unless E.'s interest in the lands was released. John S. represented to them that it would be easy to procure the release, as E.'s mortgage was only a collateral security; he applied to E., who consented to give the release on getting proper securities in substitution for the mortgage. By deeds duly executed between E. and John S., the latter pretended to give substituted securities, among others, railway shares and a promissory note. The release was executed by E. The substituted securities, the shares and the note, proved to be forgeries: —

*Held*, reversing the decree of the Court below, that E. had not, by executing the release, lost his right against the mortgaged lands, the release having been obtained from him by fraud, that even if John S. had conveyed the released lands to the directors they could only have claimed under him against E., and that the release, valid against John S. and those who claimed under him, was invalid as against E., who claimed \* not only not under John S., but against him by title paramount. — \* 789 *Eyre v. Burmester*, 90.

It was ordered that if any of the securities taken by E. when he executed the release, were valid, they were to be taken into consideration in the accounts directed. — *Id.*

2. In equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once,



and the vendor becomes a trustee for the vendee. This rule applies to personal property, as well as to real estate. And such a contract, if made with respect to the sale or mortgage of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal. — *Holroyd v. Marshall*, 191.

8. T. was the owner of certain machinery in a mill; it was purchased by H., but not removed, and T. continued in possession. T. executed a deed (which was duly registered), by which it was declared that the machinery was the property of H.; that T. desired to repurchase it for 5000*l.*, but had not the money to pay for it, wherefore it was conveyed to B. in trust, when T. should pay the money, to transfer it to him, and if he did not pay the money to hold it absolutely for H. The deed contained a covenant by T. to insure the machinery, and another covenant that all the machinery which, during the continuance of the deed, should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. T. sold some of the original machinery, purchased new machinery, and sent to H. accounts of these sales and purchases, but nothing was done by or on behalf of H. to take possession of the newly purchased machinery. On the 2d April, 1860, H. served T. with notice of a demand for payment of the 5000*l.* An execution against T. was afterwards put in by a creditor: *Held*, that though there had been no *novus actus interveniens*, the title of H. was preferable to that of the execution creditor, as to the new as well as the old machinery. — *Id.* *Mogg v. Baker*, 3 M. & W. 195, commented on. — *Id.*

- \* 790 \* 4. Where money is intrusted by A. to his solicitor for investment, but without any particular investment being then in contemplation, and is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to A. If the solicitor afterwards misapplies the money, and, to cover his fraud, obtains from another client, B., upon a false representation, a transfer of B.'s equitable interest under a previously executed mortgage, no money of A. being then paid to B., the transfer thus obtained may, on B. discovering the fraud, be set aside in equity, for no money of A. having been received by B. at the time the transfer was executed, no interest passed to A. by its execution. — *Wall v Cockerell*, 229.
5. A mortgage made subsequent to a contract for the sale of an estate, conveys to the mortgagee only that which the vendor is entitled to under that contract. If the mortgagee gives no notice of an intention to interfere with the contract, its stipulations remain as before, and affect the mortgagees as they would have affected the mortgagor. — *Rose v. Watson*, 672.
6. The owner of an estate, part of which was then subject to a contract for sale, executed a mortgage upon it. The mortgagee gave to the vendee notice of the fact of the mortgage, but in all other respects left matters as they were before the mortgage. The vendee was bound by his contract to pay certain sums at stated intervals, together with interest on all that remained unpaid. He made several of these payments, but at length

declined to complete the purchase, on the grounds, that the representations on which he had been induced to enter into the contract for purchase were unfulfilled:—

*Held*, that (these representations having been previously adjudged to be sufficient to absolve him from liability to specific performance) he was entitled, so far as the payments extended to claim a lien on the estate for their amount, and to enforce that claim against the assignees of the vendor. — *Id.*

## MORTMAIN.

1. A deed executed under the Statute 9 Geo. 2, c. 36 (the Mortmain Act), is sufficient if it is made to take effect so as to give a title to immediate possession of the land. Equity will thereon enforce the trustees' rights to all the profits of the land. It is not necessary that possession *de facto* should be had. — *Fisher v. Brierley*, 159.

2. To defeat such a deed it must be distinctly shown that there was \* an antecedent agreement between the donor and the trustees that \* 791 the deed should not take effect upon execution, but should be deferred till the death of the donor, who should in the mean time retain the benefit of the property. — *Id.*

3. A small piece of land was granted by deed (duly executed and enrolled under the Statute of Mortmain) for a charitable purpose, which could only be carried into effect by funds being provided for the purpose. The deed itself was allowed to remain in the possession of the grantor, whose managing bailiff manured and mowed the land as he did other land of the same kind belonging to the grantor, and either rented by himself or managed by him as bailiff, and the hay obtained from it was carried to the grantor's stables and there consumed. The funds necessary for carrying into effect the purpose of the deed were provided by the will of the grantor:—

*Held*, that these circumstances did not show the existence of a reservation or condition for the benefit of the grantor such as would avoid the deed. — *Id.*

4. There was no provision in the deed for appropriating in any way the produce of the land or the rent it might fetch during the interval between the date of the deed and the time when its provisions might be carried into effect:—

*Held*, that this did not constitute a resulting trust, so as to avoid the deed. — *Id.*

## NEW RULES. See JURISDICTION.

If new rules are valid in themselves, it is no objection to them that they affect suits then pending. — *The Attorney-General v. Sillem*, 704.

## NEW TRIAL, MOTION FOR. See JURISDICTION.

## NOTICE. See CORPORATION OFFICE.

## NOVUS ACTUS. See MORTGAGE, 3.

## OFFICE. See CORPORATION.

1. A person validly elected to an office and admitted to it, cannot be removed from it without notice. — *The Queen v. The Saddlers' Company*, 404.

2. The charter of the company gave the wardens and assistants thereof power to make such by-laws as, according to their sound discretion, should be for the good government of the general body : —

\* 792 \* Per LORD WENSLEYDALE. — Under this charter a by-law made by them would be valid, though it might have the effect of limiting the number of persons eligible to office by superinducing new qualifications, as to which the charter was silent. — *Id.*

3. Per LORD WENSLEYDALE. — In order to show a valid objection to the admittance, after election, the return should have stated an insolvency within the true meaning of the by-law. — *Id.*

PAROL EVIDENCE. See RAILWAY, 8.

PARTITION SUIT. See PRACTICE.

PATENT.

1. Where two specifications, of different dates, relating to the same external objects, contain terms of art, though the expressions used in both are identical, their construction cannot be declared to be the same without the meaning and use of the terms of art employed therein being first ascertained by evidence, and being shown to be the same at the date of both the specifications. — *Bells v. Menzies*, 117.

2. An antecedent specification declaring a principle, but not disclosing a practicable mode of obtaining a result, is not to be held to be an anticipation of a subsequent specification relating to the same matter which does disclose a practicable mode of producing the result. If the latter specification alone supplies that practicable mode, it forms the groundwork for a valid patent. — *Id.*

3. D. in 1804 took out a patent for making "a new article of trade, which I denominate Albion metal, and which I apply" to various purposes, such as the facings of cisterns, coffin furniture, "and other things which are required to be made of a flexible," &c. substance. D. stated in his specification the principle of his invention, and that he proposed to unite lead and tin by pressure, but he did not state the exact proportions of the two metals, nor give with precision the mode by which they were to be combined. It did not appear that the patent had been acted on. In 1849 B. took out a patent for "a new manufacture of capsules, and of a material to be employed therein, and for other purposes." The new material was to be composed of lead and tin combined. B. specified the proportions of the two metals, gave the details of the mode of working in order to combine them, and did not claim the \* production of the new material, except according to the directions he had given for its production : —

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*Held*, that this was not a case in which the Court, looking at the two instruments, could determine the validity of the latter patent as a matter of construction only ; that evidence must be resorted to ; and that then it was apparent that the earlier patent only stated a principle, and that the latter patent, as it did not claim the discovery of the principle, but only a new mode of carrying it into effect, was valid. — *Id.*

4. While a person is using, under a license, a patent machine and paying a royalty for its use, or the use of its principle embodied in any other ma-

chine, he can not, in a proceeding against him for nonpayment of royalties in respect of the use of another machine alleged to embody the principle of the patent invention, set up as a defence that the patent is not valid. He can only be allowed to contend that the second machine does not embody the principle of the patent: — *Crossley v. Dixon*, 293.

5. D. had verbally agreed with C. to be supplied by C. with machines constructed according to patents of which C. was the owner, and to pay royalties for the use of such machines, and for the use of any machines supplied to him by anybody else which embodied the principle of C.'s patents. D. was afterwards supplied by S. with machines, on the use of which C. claimed a royalty as embodying the principle in his patents, and he also charged D. with an infringement of the patents. D. defended himself against the claim, denying, first, that the agreement amounted to a license; secondly, that the patents were valid; thirdly, that there had been any infringement. The Vice-Chancellor made a decree in favour of C. directing an inquiry only on the question of infringement. The Lords Justices retained the decree, but ordered the appeal to stand over till C. had brought "any action he might be advised": —

*Held*, that this order was erroneous; that the verbal agreement must be treated as a license; that D. while he continued to act under that license could not dispute the validity of the patents, and that, with a variation of some words in the Vice-Chancellor's order, it must be restored. — *Id.*

6. The Vice-Chancellor's order had declared "that the defendant is not entitled to use any machine in the construction of which the plaintiffs' inventions, or inventions only colorably differing from them, would be employed, without paying the royalty, \* as if the carpet had been \* 794 manufactured by a machine of the plaintiffs, &c." This order was varied by introducing before the words "is not entitled," these words, "whilst he continues to use the machines bought of the plaintiffs under the agreement," or "during the continuance of the agreement between the defendant and the plaintiffs," &c. — *Id.*

PERSONAL ESTATE. See MORTGAGE, 2.

PLEADING. See CORPORATION. RAILWAY, 9.

PORTIONS. See WILL, 12.

1. Where portions for younger children are created, if their interests are vested, and the contingencies have happened on which the portions are to be paid, interest on them is payable, and the portions must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention of the parties creating the portions is to govern. — *Massy v. Lloyd*, 248.
  2. If the principal is not raiseable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words. — *Id.*
- Lord Cottenham's observations on this point (*Lord Milltown v. Trench*, 4 Clark & F. 307, 308) adopted. — *Id.*
3. There is a distinction between the word "payable," when used in speaking of a sum payable to a beneficiary, and when used in speaking of a sum payable by a trustee. — *Id.*

4. In a marriage settlement the estate was given to trustees on trust to pay the rents to the wife for life; to raise by sale or mortgage a sum of 10,000*l.* for a child of the wife by a former marriage, and also a sum of 500*l.* for a relative of the first husband, then, after the death of the wife, to pay 1000*l.* a year to the husband for life; to raise 15,000*l.* for younger child or children, to be paid at such time, in such shares, and with such yearly interest as the wife should appoint, and, in default of appointment, at twenty-one or marriage, and until such portion should become payable, to raise money for the maintenance and education of the children as the wife should deem meet, not exceeding, &c.: Provided, that if there should be no younger child, or it should die before twenty-one or marriage, 5000*l.* additional should be paid to the wife's daughter by the former marriage. The wife died in 1806, leaving a son and a daughter, both very young. The daughter attained twenty-one, and married in 1824. The father died \* in April, 1859. The Court of Chancery, in Ireland, had held that the principal sum of 15,000*l.*, though the right to it vested on the daughter marrying, could not be raised during the life of the father, but declared interest on that sum to have become payable from the date of her marriage. — *Id.*
- 795 The decree of the Court of Chancery was reversed, and the cause remitted, with directions that interest did not become payable till the death of the father. — *Id.*

POSSESSION DE FACTO. See MORTMAIN.

PRACTICE. See INTEREST ON MONEY. JURISDICTION. MARRIAGE SETTLEMENT. PATENT, 6. RAILWAY, 4, 5, 6. WILL, 11-13.

1. The trustees of a bank filed a bill against their solicitor for a breach of trust in his character of solicitor. To the bill impeaching a particular transaction, R. had been made a defendant. The Court below dismissed the bill as to him. This was erroneous, but no appeal having been lodged against this part of the decree, no order could be made upon it. — *Tyrell v. The Bank of London*, 20.
2. A mortgagee who had been, by fraud, induced to release his mortgage, was declared entitled, notwithstanding the release, to retain the benefit of the mortgage; and it was directed at the same time that the securities which he had received as the consideration for releasing his mortgage, if they should prove to be worth any thing, should be taken into consideration in the accounts directed to be taken. — *Eyre v. Burmester*, 90.
3. A question on the construction of a will of realty was raised in a partition suit between two persons claiming under a devise; the heir at law did not appear in the Court below, nor in this House. In pronouncing the decision, it was declared that that decision must be considered as pronounced without prejudice to any rights which the heir at law might claim to possess. — *Atkinson v. Holby*, 313.
4. An order made in the Court below respecting the disposition of residuary estate, was approved of by the House, but that order having directed the laying out of intermediate income till a certain event should happen, and the happening of such event being possibly beyond the period limited by

the law against accumulation, the House corrected the order in that respect, and then confirmed it. — *Bective v. Hodgson*, 656.

5. Where there is an appeal against part of a decree, and the notice \* of appeal has been served on all parties, the House will not make \* 796 a partial order, so as to enable those who did not join in the first appeal to bring another appeal. — *Id.*

**PRESUMPTION OF FACT.**

There is no presumption of fact to be made against a party who enforces the rule against the disclosure, by his solicitor, of knowledge professionally acquired. Per Lord Chelmsford. — *Wentworth v. Lloyd*, 589.

*Armory v. Delamirie* (Strange, 505) does not apply to such a case. — *Id.*

**PRIVATE ACT OF PARLIAMENT.** See **DEED.** **RAILWAY.**

**PROBATE.** See **DOMICILE.** **WILL.**

1. Where a will was made by an Englishman, who died domiciled abroad, and the foreign Court had granted probate of the will, it became the duty of the English Court of Probate (some of his personal property being situated in this country) to grant ancillary probate to the foreign executors. It had no right to constitute itself a Court of construction. — *Enohin v. Wyllie*, 1.
2. The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors, is the only admissible evidence of the will. — *Id.*

**PROCTOR.** See **QUEEN'S PROCTOR.**

**PURCHASE OR LIMITATION.** See **WILL.**

**QUALIFICATION.** See **OFFICE.**

**QUEEN'S PROCTOR.** See **DIVORCE.**

The 23 & 24 Vict. c. 144, § 7, enables any one of the public to give to the Court of the Judge Ordinary, between the decree *Nisi* and the decree absolute for a divorce, information to relieve it from being misled on the subject of a divorce petition. That section confers on the Queen's Proctor the power to intervene in a case of collusion, but in that alone, and, except in such a case, if he takes any proceedings in a suit for divorce, he appears only as one of the public giving information to the Court, and under such circumstances the Court has no power to award him costs. — *Lautour v. The Queen's Proctor*, 685.

**QUEEN'S REMEMBRANCER.** See **JURISDICTION.**

\* **RAILWAY.** See **DEED.**

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1. A railway bridge, though constructed in a more than ordinarily solid and weighty manner, and so requiring more than ordinary subjacent and adjacent supports, must be considered as something within the ordinary purposes of a railway. — *Elliot v. The Northeastern Railway Company*, 333.
2. A vendor of land, having sold it under an Act of Parliament for the particular purposes of a railway, cannot afterwards work the minerals under the surface (though they have been expressly reserved to him, either by his grant or by the provisions of the company's own Act), in such a manner as to prejudice the use of the land for the purposes for which it has been purchased. The common law right to adjacent support from

the vendor's land attaches upon such a sale even beyond the limits of the purchased land. — *Id.*

3. After the passing of an Act which recited that it was expedient to make a railway, and that a bridge was to be thrown over a particular river, &c., A. sold (under the compulsory power in the Act) a portion of his land intended to be used as the foundation of one of the ends of the bridge. The Act itself expressly excepted all mines from the operation of the conveyance, declared the landowner entitled to work the mines under the land not purchased, doing no damage to the railway, but it did not give the directors the power to compel a sale; on his approaching within twenty yards of the masonry, it required him to give notice to the directors, and then gave them the right to compel a sale of his interest in the mines within the twenty yards, but should they decline to purchase, allowed him to work the mines, doing no "avoidable damage": —

*Held*, that the introduction of these special provisions did not exclude the directors from the benefit, beyond the twenty yards, of the common law right, existing in the purchaser of the surface, to adjacent support from the vendor's land. — *Id.*

4. An injunction granted in such a case to restrain the working of the mines, so as to take away this adjacent support, is not required to state the precise limits within which they may be worked. — *Id.*
5. In granting an injunction to prevent the working of mines, so as to occasion the removal of adjacent support to land purchased by a railway company, for the purposes of a railway, the Court below allowed the mine owner to drain a shaft, which, by the accidental overflowing of a neighbouring river, \* had, for years before and since the purchase, been filled with water. From this perpendicular shaft ran, horizontally, several passages or spaces, which had been filled with water from the same cause. The injunction forbade mining works which might injure the railway, but allowed the shaft to be drained. This House, adopting the opinion of the Court below, that the overflowing of the shaft was an accident which the railway company was not entitled to expect would for ever be allowed to exist without correction, varied the decree below by adding to the permission to drain the shaft, that of draining the horizontal passages or spaces. — *Id.*
6. The Court below, on the ground that this case involved matter which might properly be made the subject of litigation, gave no costs. This House did not disturb the order in that respect. — *Id.*
7. All the parts of the seventh section of the "Railway and Traffic Act, 1854," must be read together, and therefore the conditions there spoken of as capable of being imposed by railway companies in limitation of their liability as common carriers must not only be, in the opinion of a Court or Judge, just and reasonable, but must also be embodied in a special contract in writing, signed by the owner or sender of the goods. — *Peck v. North Staffordshire Railway Company*, 473.
8. The owner of some marble chimney-pieces desired to send them to London. Messages and notes passed between him and the agent of a railway company on the subject of the terms on which they were to be

carried. The agent stated, as a condition, that the company would not be responsible for damage to goods sent by the railway, unless their value was declared and they were insured, the rate of insurance being fixed at ten per cent. on the declared value. After some delay the agent received a note requesting that the marbles might be forthwith sent to London "not insured"; they were sent, and suffered damage:—

*Held* (diss. Lord Chelmsford), that the condition thus sought to be imposed by the company was not just and reasonable; that there was not any special contract signed by the parties within the meaning of 17 & 18 Vict. c. 31, § 7; that the note could not be connected with the other communications so as to constitute the required contract; that the words "not insured" could not be made the subject of explanation by parol evidence; and that they left the rights and liabilities of the parties as at common law. — *Id.*

9. Per LORD CRANWORTH. — The burden of showing that a condition is just and reasonable lies on the railway company. — *Id.*

*Simons v. The Great Western Railway Company* (18 C. B. 805) confirmed. — *Id.*

10. Per LORD WENSLEYDALE. — This is a plea in bar to the whole cause of action in respect of damage, however caused. — *Id.*

#### RELEASE.

1. E. was the holder of a mortgage on lands given him by John S., who was largely his debtor. John S. afterwards mortgaged these lands to the directors of a banking company as security for existing debts and for some fresh advances. Before these advances were actually made the solicitor for the directors discovered that the lands had been previously mortgaged to E. The directors refused to complete the transaction with John S. unless E.'s interest in the lands was released. John S. represented to them that it would be easy to procure the release, as E.'s mortgage was only a collateral security; he applied to E., who consented to give the release on getting proper securities in substitution for the mortgage. By deeds duly executed between E. and John S., the latter pretended to give substituted securities, among others, railway shares and a promissory note. The release was executed by E. The substituted securities, the shares, and the note, proved to be forgeries:—

*Held*, reversing the decree of the Court below, that E. had not by executing the release lost his right against the mortgaged lands, the release having been obtained from him by fraud; that even if John S. had conveyed the released lands to the directors, they could only have claimed under him against E., and that the release, valid against John S. and those who claimed under him, was invalid as against E., who claimed not only not under John S., but against him by title paramount. — *Eyre v. Burmester*, 90.

2. It was ordered that if any of the securities obtained by E. when he executed the release were valid, they were to be taken into consideration in the accounts directed. — *Id.*

REMAINDERS. See WILL, 10.

REMEMBRANCER. See JURISDICTION.



\* 800 \* REMOVAL FROM OFFICE. See OFFICE.

RESERVATION OF RIGHT. See MORTMAIN.

RESIDUE. See MARRIAGE SETTLEMENT.

1. The rules which are applicable to the gift of a residue are applicable to the parts into which that residue may be divided. — *Bective v. Hodgson*, 656.
2. T. by his will devised his real estates to trustees, on trusts, one of which was a disposition, good as an executory devise, which could not take effect until the death of his daughter. He directed the residue of his personal estate to be divided into three equal parts, and gave the same to his trustees (who were also his executors) on trust to invest two third parts in the purchase of real estate to be settled to the same purposes as those directed as to his original real estates, — the other third to be also invested in the purchase of real estate to be conveyed to the use of a person then in being: —

*Held*, that the intermediate income of these two thirds was not undisposed of by the will, but must be laid out in the purchase of real estate, according to the directions in the will, until such time as some person should be entitled to possession under the limitations declared by the will, so far at least as not to exceed the period allowed by law for accumulation. — *Id.*

RESULTING TRUST. See MORTMAIN.

RETURN. See CORPORATION.

REVENUE SIDE OF THE EXCHEQUER. See JURISDICTION.

ROYALTY. See PATENT.

RULES OF COURT. See JURISDICTION.

SALE. See CONTRACT. MORTGAGE.

SALE AND TRANSFER OF LANDS.

1. A conveyance made under 21 & 22 Vict. c. 72 ("Sale and Transfer of Lands, Ireland") is, by section 85, "for all purposes conclusive evidence" that all previous proceedings leading to such conveyance have been regularly taken. — *Power v. Reeves*, 645.
2. Where, therefore, proceedings had been taken for the sale of certain estates, and their sale and resale had been directed in a manner which, when presented to the notice of this House, was declared to be marked
- \* 801 with great irregularity, but the party \*complaining had not brought the matter before the Court of Appeal until after the conveyances had been executed, it was held that this House was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities. — *Id.*
3. When the appellant did go before the Court of Appeal his petition was dismissed with costs. The House reversed the order for costs, but affirmed the dismissal of the appeal. — *Id.*

SETTLEMENT. See PORTIONS.

SOLICITOR. See PRESUMPTION OF FACT.

1. It is an established rule that a solicitor shall not, in any way whatever, in respect of any transactions in the relation between him and his client, make gain to himself, at the expense of his client, beyond the amount of his just and fair professional remuneration. — *Tyrrell v. The Bank of London*, 26.

2. T., a solicitor, had a private arrangement with R., by which he was to receive from R. a share in certain property then belonging to R., and to share the profit to be obtained from the sale of that property. In his character of solicitor, T. acted for clients (a banking company) in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it:—

*Held*, affirming the decree of the Court below, that T. was to be treated as a trustee for his clients in respect of so much of the joint property of R. and himself as they had actually purchased; but so much of the decree of the Court below as had declared him to hold the rest of the property also in trust for his clients, was varied. — *Id.*

3. T., having made a large profit on the sale, was ordered to pay back the amount of this profit with the full amount of interest given in cases of a breach of trust, namely, five per cent.— *Id.*
4. Where money is intrusted by A. to his solicitor for investment, but without any particular investment being then in contemplation, and is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to A. If the solicitor afterwards misapplies the money, and to cover his fraud obtains from another client, B., upon a false representation, a transfer of B.'s equitable interest under a previously executed mortgage, no money of A. being then paid to B., the transfer thus obtained may, on B. discovering the fraud, be set aside in equity, for no money of A. having \* been received by B. at the time the trans- \* 802  
fer was executed, no interest passed to A. by its execution. — *Wall v. Cockerell*, 229.

Circumstances which may constitute acquiescence of B. in the solicitor's fraud, and deprive him of the right to relief. — *Id.*

SPECIFIC PERFORMANCE. See MORTGAGE.

SPECIFICATION. See PATENT.

STATUTES.

- 9 Geo. 2, c. 36. 159.
- 11 Geo. 4, and 1 Wm. 4, c. 68. 473.
- 3 & 4 Wm. 4, c. 85. 367.
- 15 & 16 Vict. c. 76. Common Law Procedure Act, 1852. 704.
- 17 & 18 Vict. c. 31. 473.
- 17 & 18 Vict. c. 125. Common Law Procedure Act, 1854. 704.
- 20 & 21 Vict. c. 85. 685.
- 21 & 22 Vict. c. 72. 645.
- 21 & 22 Vict. c. 106. 367.
- 22 & 23 Vict. c. 21. 704.
- 23 & 24 Vict. c. 144. 685.

SUBJACENT SUPPORT. See RAILWAY.

SURVIVORSHIP. See WILL.

TENANTS IN COMMON FOR LIFE. See WILL.

TESTACY. See DOMICILE.

TRUST. See CLIVE FUND. SOLICITOR.

TRUSTEE. See MORTMAIN. PORTIONS.

VARIATION OF DECREE. See MARRIAGE SETTLEMENT. PATENT. WILL.

VENDOR AND VENDEE. See MORTGAGE, 3.

VOLUNTARY CONVEYANCE. See DEED.

WILL CONSTRUCTION, RULES OF. See DOMICILE. EVIDENCE.

1. A., a British subject, domiciled at St. Petersburg, made a will in the Russian form and Russian language, by which he expressed a desire "to dispose of all my moveable and immoveable property." After giving legacies, and directing his household property and estates in Russia to be sold, he went on, "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets" [a bank debenture peculiar to Russia], "belonging to me, shall be divided into ten \*equal parts"; two of which he devoted to debts and funeral expenses; and said, "of the remaining eight parts, I intend afterwards making a detailed disposal"; but if he did not (and he never did), they were to go to charitable purposes. He then named executors, and concluded thus, "and as all my moveable and immoveable property is mine own, honestly acquired by myself, nobody has a right to interfere with my dispositions and contest the same, and no one has a right to interfere with or contest the dispositions and proceedings of my executors." The testator had large funds in the English consols: *Held*, that the executors did not take these consols under the general bequest in the will; and *Held* also, that as to these consols, there was an intestacy. — *Enohin v. Wylie*, 1.
2. The benefit of survivorship may be given to those who have life interests as tenants in common. — *Taaffe v. Connée*, 64.
3. The word "survivor" in gifts of personal estate may be taken as referring to the period of distribution. It is not equally settled that with regard to real estate it applies to the determination of the prior limitation. — *Id.*
4. When the word "survivor" is applied to a class of persons, and individuals of that class are named, its natural meaning is "the longest liver" of those who are named. — *Id.*
5. A. devised his estates in trust to the use of his nephew, D. F., and his issue male in strict settlement, "and for default of such issue male in D. F., to the use of my nieces Julia, Rose, and Bridget, and the survivor of them for the term of their natural lives, as tenants in common and not as joint tenants, without impeachment of waste, and from and after their decease to the use of their first and every other son and sons, and the heirs male of their respective bodies, successively, in equal proportions, the elder of such sons of each of my said nieces and the heirs male of their bodies being always preferred, &c., and for default of such issue male, then to the daughters of the said Julia, Rose, and Bridget, and for default of such issue male or female to my own right heirs." He directed that no son of a niece should take any benefit under the will, unless on assuming his name. D. F. died without issue. Julia had a daughter; Rose and Bridget had, each, a son; Julia and Rose died: —  
*Held*, that the nieces took as tenants in common for life with cross remainders between them for life; that on the deaths of Julia and Rose,  
 \* 804 the "survivor," Bridget, took the whole for \* life; that the sons took a remainder, expectant on her death, as tenants in common in tail male, and

that there was no estate in any daughter of a niece, until a total failure of issue male. — *Id.*

6. When there is a devise of land to "A. B. and his children," and at the time of the devise he has no child, the word "children" is *primâ facie* a word of limitation, and the first taker shall have an estate tail; if he has children, it is *primâ facie* a word of purchase, and gives a joint estate to him and his children as purchasers. But either of these constructions may be defeated by the plain intention of the testator to be collected from the whole of the will. — *Byng v. Byng*, 171.

7. A testatrix, in a holograph will, gave "in trust to my executors for my niece M. A. B. and her children, all my Quendon Hall estates in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, India cabinet, striking watch, and my diamond ear-rings as *heirlooms* with my estate." The niece died before the testatrix, leaving several children: —

*Held*, affirming the decree of the Court below, that "children" was a word of flexible meaning, and that on the whole context of this will it must be read as a word of limitation, so that the eldest son of the niece took an estate tail in the devised property. — *Id.*

8. *Semble*, that "heirlooms" here meant something which, though not in its own nature heritable, is to have a heritable character impressed upon it. — *Id.*

*Wild's Case*, 6 Co. Rep. 17, and *Buffar v. Bradford*, 2 Atk. 220, explained. — *Id.*

9. It is not a good rule in construing a will to consider what power would be, by a particular construction, given to a particular person, by the exercise of which he might be able to defeat what appears to be the general purpose of the will. — *Atkinson v. Holtby*, 313.

10. A testator devised particular estates to the use of his daughter E. for life, remainder to her children, remainder to John, the elder son of another daughter F., for life; then to John's children; then to George, second son of F., for life; then to George's children; remainder to A., F., F. and E., the other children (daughters) of his daughter F., in equal shares; remainder to trustees to preserve, and remainder in equal \*shares \* 805 to the children of his four granddaughters, and the heirs of their bodies, such children taking their mother's share as tenants in common in tail; remainder to the survivor of such children; in default of issue of granddaughters, over. He devised his residuary estates, in the same manner, to his daughter F., and then to John and George, as before, and then, "in default of such issue, to A., F., F. and E. for their lives, in equal shares; remainder to trustees to preserve the contingent remainders hereinafter limited; remainder in four equal shares to the children of my granddaughters, and the heirs of his, her, or their body, such children taking their mother's share as tenants in common in tail, remainder to the survivors or survivor, and the issue of their bodies in tail; in default of issue of my granddaughters," over. — *Id.*

*Held*, reversing a decision of the Lords Justices, and affirming that of the

Master of the Rolls, that the granddaughters, and not their children, took estates tail with cross remainders between them, and that, consequently, all the granddaughters but one having died without issue, and that one having left a son and a daughter, the son was entitled to an estate in fee simple in seven-eighth parts of the estate, and the daughter to the remaining eighth part. — *Id.*

11. A question on the construction of a will of realty was raised in a partition suit between two persons claiming under a devise; the heir at law did not appear in the Court below, nor in this House: —

In pronouncing the decision, it was declared in this House that that decision must be considered as pronounced without prejudice to any rights which the heir at law might claim to possess. — *Id.*

12. A., the younger of two sisters (the only children of their father), was about to be married. By a pre-nuptial contract executed abroad, where the marriage was to be celebrated, and the parties to it were domiciled, the father agreed to give A. a dowry of 40,000*l.*; of these, 20,000*l.* were to be paid within six months after the marriage; the remaining 20,000*l.*, divided into two sums of 10,000*l.* each, were made payable, one sum on a given event, the other on the father's death, with power reserved to him to pay the last-mentioned sum during his life. In the contract he declared his intention to give to A. an equal portion with her sister of what he should leave as • residue, and used words which appeared to make it doubtful whether this portion was to be ascertained before or after payment of debts and legacies. By his will he gave legacies to an amount which, with the debts, entirely exhausted what would otherwise have been residue. The final sum of 10,000*l.* was not paid in his lifetime. After his death A. filed a bill against his representatives, to obtain payment of this sum, and also payment of the share of the residue, calculated on its gross amount before payment of debts and legacies. The Court below held that on the proper construction of the contract this latter claim was unfounded; and, as to this claim, dismissed the bill with costs, but ordered payment of the 10,000*l.*, with interest to be calculated from the period of six months after the father's death: —

*Held*, that the order dismissing the bill with costs was right, for that the claim was founded on a misinterpretation made by the plaintiff of the contract, and was not the consequence of any act of the testator, such as ought to make the costs come out of the estate. — *Di Sora v. Phillipps*, 624.

13. But the decree was varied so far as related to the interest on the 10,000*l.*, which was ordered to be calculated from the date of the father's death. — *Id.*

14. Where, for the purpose of a disposition in a will, real estate is directed to be converted into money, or money to be converted into real estate, and the disposition fails, though the conversion has actually taken place, the real estate, or the money, will retain its original character for the purpose of ascertaining the ownership of it. — *Bective v. Hodgson*, 656.

15. The rules which are applicable to the gift of a residue are applicable to the parts into which that residue may be divided. — *Id.*

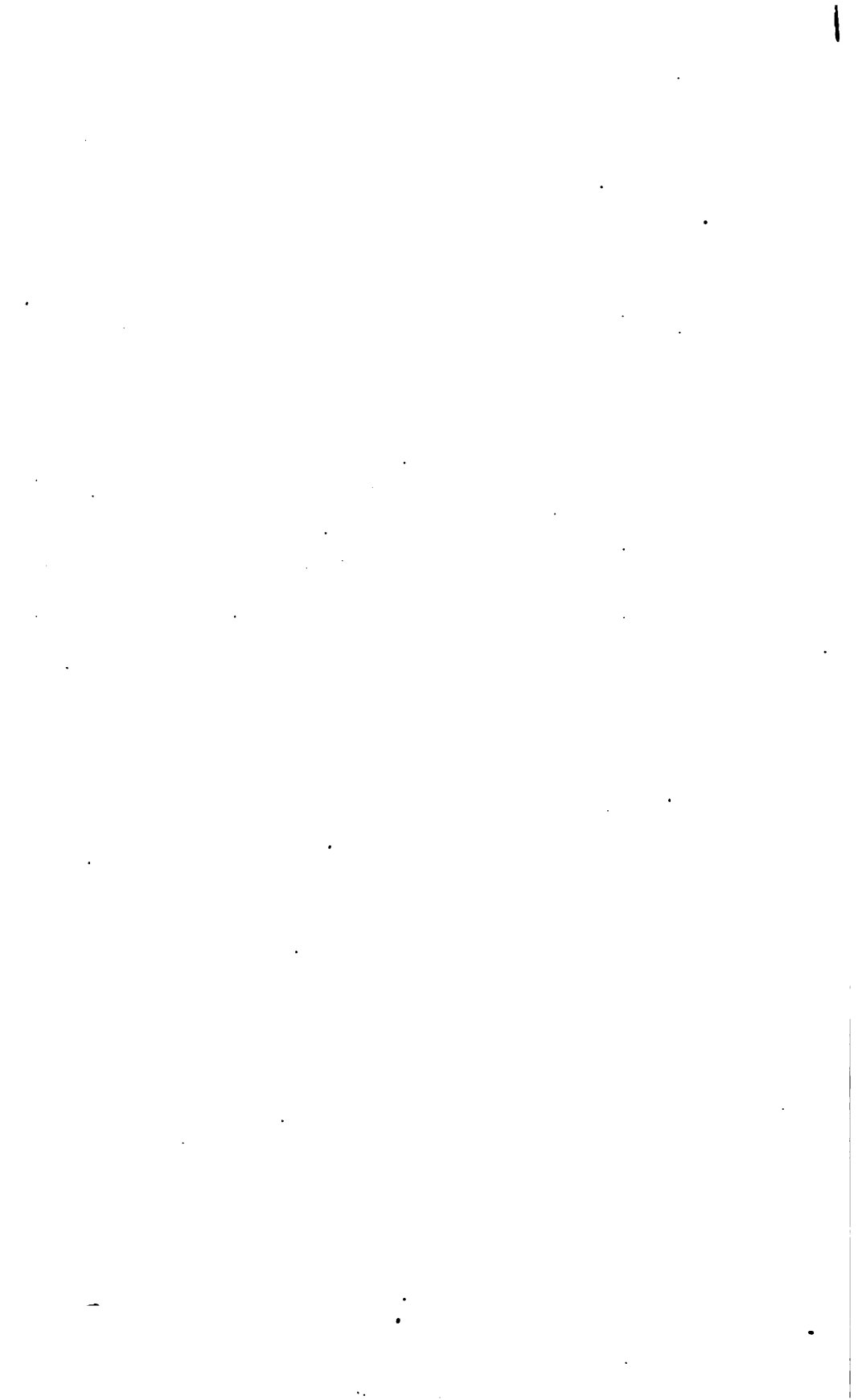
16. T. by his will devised his real estates to trustees, on trusts, one of which was a disposition, good as an executory devise, which could not take effect until the death of his daughter. He directed the residue of his personal estate to be divided into three equal parts, and gave the same to his trustees (who were also his executors) on trust to invest two third parts in the purchase of real estate to be settled to the same purposes as those directed as to his original real estates, — the other third to be also invested in the purchase of real estate to be conveyed to the use of a person then in being :—

*Held*, that the intermediate income of these two thirds was not \* un- \* 807 disposed of by the will, but must be laid out in the purchase of real estate, according to the directions in the will, until such time as some person should be entitled to possession under the limitations declared by the will, so far at least as not to exceed the period allowed by law for accumulation. — *Id.*

#### WORDS, CONSTRUCTION OF.

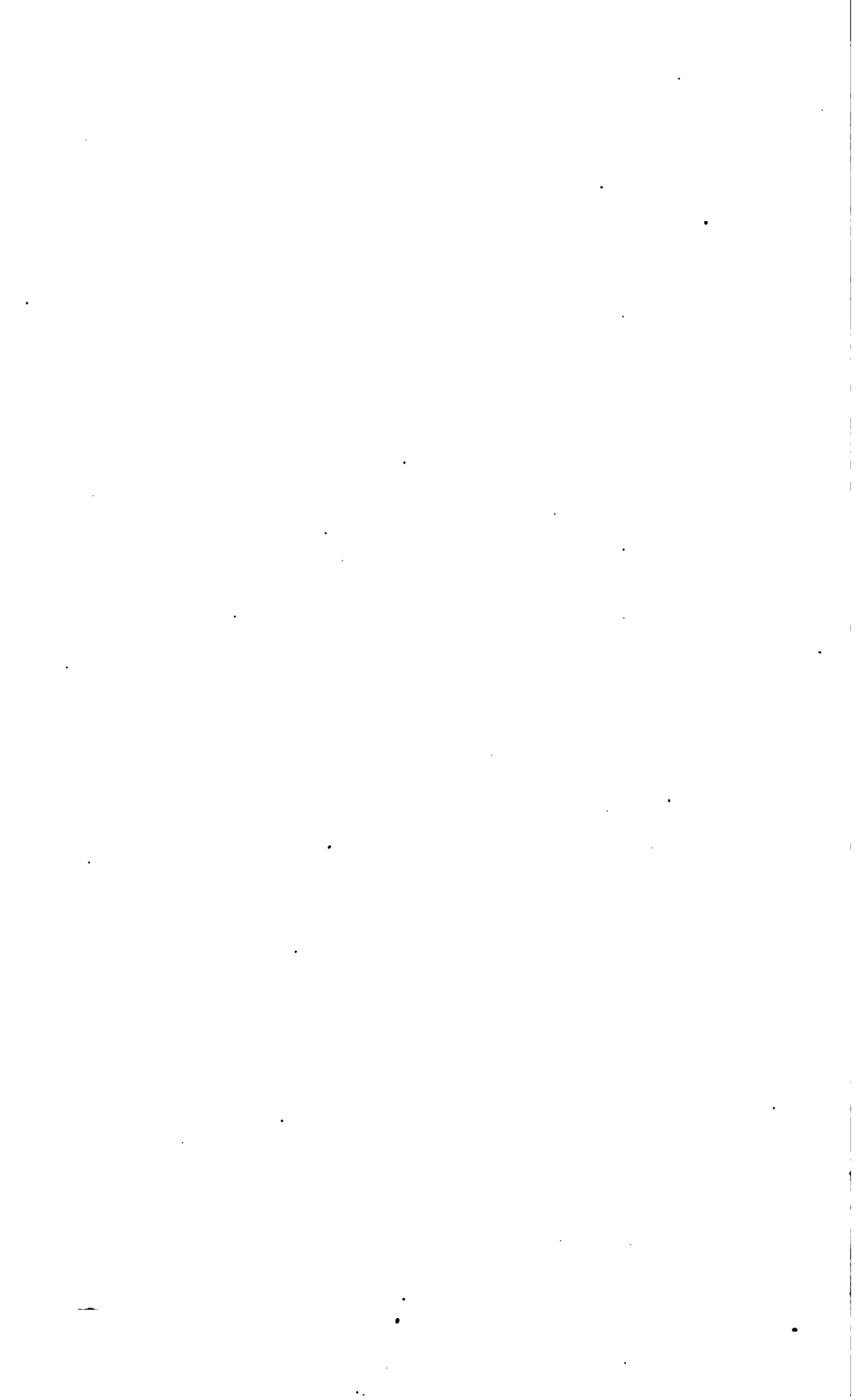
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